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HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 152

IRA W. JAYNE, CHESTER P. O'HARA, ET AL., JUDGES OF THE CIRCUIT COURT FOR WAYNE COUNTY, ET AL.,
Appellants,

vs.

CITY OF DETROIT, JOHN H. WITHERSPOON, CONTROLLER; JAMES A. HOYE, DEPUTY COMMISSIONER AND DIRECTOR OF TRAFFIC OF THE POLICE DEPARTMENT OF THE CITY OF DETROIT

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

STATEMENT AS TO JURISDICTION

GEORGE E. BRAND,
GEORGE E. BRAND, JR.,
3709 Cadillac Tower,
Detroit, Michigan,
Counsel for Appellants.

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SUPREME COURT OF MICHIGAN

No. 46054

CITY OF DETROIT, JOHN H. WITHERSPOON, Controller, and JAMES A. HOYE, Deputy Commissioner and Director of Traffic of the Police Department, of Said City of Detroit,

Plaintiffs,

vs.

IRA W. JAYNE, CHESTER P. O'HARA, ET AL., Judges of the Circuit Court for Wayne County, Michigan; SERVICE PARKING GROUNDS, CIVIC CENTER GARAGE, INC., MADISON PARKING CO., PARKING REALTY COMPANY, PARKING INVESTMENT CORPORATION, PARK PLACE CORPORATION, THEATRE PARKING, INC., UNION PARKING COMPANY, INCORPORATED (All Michigan Corporations); JOSEPH FEE and BEULAH FEE, Copartners as Willis Parking Co.; JOSEPH M. JOSEPH, d/b/a Adams Parking Co.; HYMAN MILLER and TILLIE MILLER, Copartners as Jefferson Parking; SIDNEY POZEN, d/b/a Sidmar Parking Co.; GEORGE SALLOUM, d/b/a Fox Parking Co.; GEORGE RASHID, d/b/a Bagley Parking Co.; SAMUEL C. BINKOW, M. BERTHA BINKOW, JOSEPH KATCHKE and IRMA J. KATCHKE, Copartners as Briggs Parking, and LOTTIE FELDMAN,

Defendants

JURISDICTIONAL STATEMENT BY APPELLANTS

Appeal by private owners and operators of off-street automobile parking garages and lots from a final judgment

of the Supreme Court of Michigan prohibiting further proceedings in appellants' pending suit, against the appellees City of Detroit and its Controller, in the Circuit Court for Wayne County, Michigan, in Chancery, for injunction and declaratory relief respecting the City's acquisition, operation, maintenance and financing of competing off-street automobile parking facilities claimed by the City to be authorized by certain Michigan statutes, city ordinances and the city charter.

I

Statute Believed to Sustain Jurisdiction

28 USC § 1257, which provides that final judgments rendered by the highest court of a state in which a decision could be made may be reviewed by the Supreme Court of the United States (2) by appeal, where is drawn in question the validity of the statute of a state on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity.

II

Statutes of State Involved

Michigan Revenue Bond Act of 1933 (Act 94, Michigan Public Act 1933, as amended), Vol. 1, Michigan Compiled Laws 1948, §§ 141.101-141.138, implemented by *Act 286, § 1, Michigan Public Acts 1947,* Vol. 1, Michigan Compiled Laws 1948, § 141.161.

Detroit City Ordinance No. 672-E, effective August 9, 1952, as amended by Detroit City Ordinance No. 804-E, effective December 10, 1953.

The Revenue Bond Act relates to the acquisition, etc. of "public improvements" by public corporations and the financing thereof by the issuance of revenue bonds (pursuant to definitive ordinance) which shall be payable solely

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from the resulting net revenues. Pertinent provisions of the Act are those which define the term "public improvements" to mean and be limited to, *inter alia*, "automobile parking, and terminal facilities," and the term "net revenues" to mean the revenues of any public improvement remaining after deducting the reasonable expense of administration, operation and maintenance thereof, and provide that two or more public improvements may be operated as one improvement and that the revenues thereof may be pledged to defray the cost of acquisition, construction, operation and maintenance thereof and the principal and interest of the bonds, for which payment the ordinance shall create a lien upon the net revenues pledged, enforceable by receivership, etc., but not by compulsory sale.

Said Act 286, § 1, Michigan Public Acts 1947, implemented the Revenue Bond Act by authorizing cities to acquire, improve, and operate automobile parking facilities for the use of the public and to finance the same under the Revenue Bond Act, but provided that such facilities shall not be exempt from taxation if a fee is charged for their use.

The two Detroit City Ordinances are printed in full in the record.[1] Pertinent provisions thereof are those which provide that after January 1, 1954, all existing and future on-street parking spaces for which a fee or charge is collected by parking meters, two already acquired off-street parking lot facilities (known as Joy Road and Seven Mile Road), all off-street parking facilities authorized by ordinance to be acquired and constructed, together with on-street and off-street parking meters shall be "maintained and operated" by the City as an automobile parking system (R. 55-56); that the City issue, under the Revenue Bond Act, $2,400,000, 30 year, interest-bearing, revenue bonds for the financing of two initial off-street garages (R. 56); that additional bonds,

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[1] R. 21-51 as to No. 672-E, and R. 51-72 as to No. 804-E.

of equal standing, may be issued for the acquisition and construction of other parking facilities (R. 49); that the terms "revenues" and "net revenues" shall mean as defined in the Revenue Bond Act (R. 57); that the parking fees for on-street and for off-street parking shall be fixed and revised from time to time as may be necessary to produce the amounts required to pay the expenses of operating and maintaining the system and the bond principal and interest when due (R. 60-61), for the security of which a statutory first lien upon the net revenues of the system is created (R. 31, 43), the City covenanting and agreeing at all times to fix, maintain and collect such parking fees sufficient for said purposes (R. 60), and that the City will maintain parking meters, enforce parking regulations and thereby collect rates as required by the ordinance on all public streets where such meters are presently or hereafter located, until the principal and interest of the bonds are paid, changes in location of the meters necessary because of street widenings or closings or to meet other traffic control requirements, not materially lessening the income and revenues of the system, excepted (R. 42-43).

III

Nature of the Case—Circuit Court Suit

On December 15, 1953, Service Parking Grounds and the other appellants, as plaintiffs, filed their said bill of complaint (R. 74-151) in the Circuit Court for the County of Wayne, Michigan, in Chancery, against the appellees alleging: the extent of appellants' off-street automobile parking garages and lots, and their large investments therein, in downtown Detroit; the City's plan to construct, own, operate, on a fee-charge basis, and maintain, upwards of 30 off-street automobile parking garages and other facilities upon

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lands acquired and to be acquired by the City, in and near downtown Detroit, and to finance the cost of such acquisition, construction, operation and maintenance by revenue-bond financing under said Michigan Revenue Bond Act of 1933 as amended, *ante*, and under and as provided in Detroit City Ordinances No. 672-E, and No. 804-E, *ante;* that said ordinances provide for the immediate construction of two of said garages, and for open-end financing thereof and of other parking facilities contemplated by said plan; that there was and is no shortage of off-street automobile parking facilities in downtown Detroit or nearby areas; that for years the City has, by meter collections for on-street parking, collected, and is continuing to collect, large sums in excess of the cost of such meters and the cost of operating and regulating them; that said ordinances provide for the use of the parking meter collections for the purposes of acquisition, construction, operation and maintenance of the City off-street parking facilities and obligate the City to continue on-street parking in downtown Detroit regulated by meters then and thereafter installed and thereby to collect sufficient to pay the principal and interest on the revenue bonds, and the expenses, administration and operation of the facilities; that the City's Counsel had advised the City that off-street parking facilities owned or operated by it are exempt from taxation, and that two off-street City acquired parking facilities acquired by such use of meter collections already in operation were not being taxed by the City; that the effect of the City's off-street parking plan was and will be unlawful and unfair competition with appellants' parking businesses and, *inter alia*, that the same and the provisions of the ordinances contracting to continue present and future on-street parking and excessive meter collections therefor and the use of such collections for purposes of City owned, operated and maintained off-street parking

garages and other parking facilities, was and will be in violation of the rights of the appellants guaranteed by the Constitution of the United States.

In paragraph 30, divisions (1)-(4), (a)-(c), of their said bill of complaint (R. 129-131) appellants also alleged that: parking meters then or thereafter used in connection with on-street automobile parking were not and are not a "public improvement" within the intendment, contemplation or scope of the Revenue Bond Act, and that income, fees or charges collected by such meters are not "revenue" usable for the acquisition, construction, operation or maintenance of off-street automobile parking facilities; that neither the two initial off-street garages nor any of the garages or other facilities contemplated to be financed by the Ordinances are or will be operable as a self-liquidating public improvement within the contemplation of said Act and, therefore, may not be combined with others thereunder; that said Act does not provide or contemplate that excessive on-street parking meter moneys collected by the City may be used for off-street parking purposes, but if it does, the provisions of said Act, so providing or contemplating, not only exceed the rights of the City in the streets under the Michigan Constitution but exceed the granting power of the legislature, and that:

> 4(c) "The result of granting, directing or authorizing the City to use said parking meter money for off-street automobile parking facilities and also the result of the exercise of such power by the City, will be to deny plaintiffs, and each of them, [of] the equal protection of the laws and to deprive them of their and each of their property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States (R. 130-131) and to Article 2, Sections 1 and 16 of the Constitution of the State of Michigan, and also to take the properties and businesses of plaintiffs and each of them for public use without the neces-

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sity therefor being first determined and compensation therefor made or secured in the manner prescribed by law, contrary to Article 13, Section 1, of the Constitution of the State of Michigan" (R. 131).

In paragraph 31 of their bill of complaint (R. 131-133) appellants also alleged that: said Ordinances Nos. 672-E and 804-E, and in any event, the portions thereof pertaining to the use and pledging (for off-street automobile parking purposes) of money collected by parking meters as to on-street parking, and as to the parking meter rates, charges and fees, and the location and continuance of present and future street parking meters, are unconstitutional, illegal and void for each of the reasons set forth in divisions (1), (2), (3) and (4) of paragraph 30 of said bill of complaint, *ante*, relating to the Revenue Bond Act, and for the additional reasons that the City lacks the right to acquire, etc., off-street parking facilities because of lack of necessity therefor and because the existing facilities are adequate, that requiring 5 cent meter deposit unreasonable, excessive and illegal, that permitting and contracting to continue downtown and other on-street parking, both as to such parking and as to the amount of money to be derived therefrom, is and will be an unreasonable, illegal and improper regulation and control of the streets and an unwarranted and improper interference with appellants' rights to the use of the city streets for travel and a violation of the City's duty to protect and preserve such rights, that the continuation of improper and illegal exactions by meters for on-street parking to be devoted to off-street parking purposes will be in wrongful, illegal and unfair competition with appellants and others engaged in furnishing off-street parking facilities, and that said ordinances are unjust, unreasonable, illegal and discriminatory class legislation and attempt to confer upon the City powers which it cannot constitutionally or legally exercise and to commit it to obligations as to on-

street parking meter collections that are beyond the City's power constitutionally or legally to incur.

In their bill of complaint (R. 134-137) appellants prayed for a judicial declaration and determination of the several questions raised by them, for decree that the on-street parking meters are not public improvements within the Revenue Bond Act and that such meters cannot constitutionally or legally be combined with, nor can money collected thereby be used for, off-street parking facilities; that no off-street parking facility acquired, owned or operated by the City not reasonably capable of producing net revenue adequate to pay the cost thereof, is a proper subject of revenue-bond financing; that the two ordinances and the financing therein provided for is invalid; that the City cannot legally collect for on-street parking more than the reasonable cost and expense of regulating such parking nor sums which produce substantial profit or revenue to the City by reason of such meters; that off-street parking facilities acquired, constructed, maintained or operated by the City are not and cannot be exempt from taxation by the City, and that a temporary and permanent injunction issue restraining consummation of the proposed financing, the use of meter collections for off-street parking purposes, and the contracting to maintain present and future meter collections for on-street parking sufficient to pay the bonds, interest and other items contemplated by the ordinances. General relief was also sought. No temporary injunction or restraining order was issued.

Personal service of summons and of copy of the bill of complaint was made on each of appellees-defendants on December 15, 1953, and proof thereof was filed. On December 30, 1953, the appellees (as defendants) without special appearance, filed, and on December 31, 1953, served their motion (R. 222-223) to dismiss the bill of complaint on grounds that appellants were not proper parties plaintiff and not

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entitled to bring the suit, that the bill of complaint states no cause of action nor ground for equitable relief, and that the court lacks jurisdiction of the plaintiffs or subject matter. This motion was not noticed for hearing nor was it heard or determined.

Supreme Court—Prohibition-Mandamus

On December 31, 1953 appellees filed in the Supreme Court of Michigan, as an original proceeding, their petition for writ of prohibition and mandamus against the Judges of the Circuit Court of Wayne County, Michigan, and appellants, prohibiting them from continuing with, and requiring them to discontinue, the Circuit Court suit (R. 1-192). Attached to the petition, as Exhibits, were copies of Ordinances Nos. 672-E and 804-E (R. 21-72), and of appellants' Circuit Court bill of complaint (omitting the exhibits thereto) (R. 73-148), and 39 newspaper articles and editorial favoring the City off-street parking plan and ertical of opposition thereto (R. 153-192).

In said petition appellees alleged that the Circuit Court was wholly without jurisdiction to consider and determine the litigation in that court for the reason that appellants, as plaintiffs therein, have no litigible interest in the matter either as residents, taxpayers or so-called competitors, no tax moneys, and no competition being involved inasmuch as the City is not operating a business but is performing a police power function. Appellees also alleged that all of the questions presented in the bill of complaint had been settled by decisions of the Supreme Court of Michigan in prior cases between other parties. Upon the filing of this petition the Supreme Court issued an *ex parte* order on December 31, 1953, returnable January 12, 1954, requiring the Wayne Circuit Court Judges and appellants to show cause before the Court on January 14, 1954, why prohibition and/or mandamus should not issue (R. 226).

Responses to the order to show cause (including answers to the petition) were filed on January 12, 1954, by the Judges (R. 193-196) and by appellants (R. 197-219). In paragraph 2(a), (b) and (c) of appellants' response (R. 198-199) they asserted that the subject matter was within the invoked jurisdiction of the Circuit Court and not within the jurisdiction of the Supreme Court and

> "(c) To prohibit the individual respondents from taking any further proceedings in their Circuit Court cause and to require them to discontinue said cause, would be to deny them, and each of them, the equal protection of the laws, and to deprive them of their and each of their property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States and also to Article 2, §§ 1 and 16 of the Constitution of the State of Michigan, and would also take the properties and businesses of the individual respondents and of each of them, for public use without the necessity thereof being first determined and just compensation therefor being made or secured in manner prescribed by law, contrary to Article 13, § 1 of the Constitution of the State of Michigan."

In paragraph 3(a)-(e) of said response (R. 199-200) appellants alleged that if the Supreme Court had jurisdiction, the petition should nevertheless be denied for the foregoing reasons and

> "(c) If the facts alleged in said Circuit Court bill of complaint are not to be deemed admitted, or are deemed to be challenged by the allegations of the petition herein, said allegations are denied and controverted in the subsequent paragraphs of this response and the taking of a large amount of testimony will be required, which is the respondents' right to take as to the issues of fact thus created, before final decisions by this Court can or should be made. To deny respondents such right would be to deny them the equal protection of the laws

and to take their property without due process of law, contrary to the applicable provisions of the Constitutions of the United States and of the State of Michigan referred to in division (c) of paragraph 2 of this response, ante."

In paragraphs 4-25 (R. 201-219) appellants controverted the allegations of the petition and added the further contentions that the provisions of the Ordinances as to continued on-street parking and meter collections therefor were in violation of Michigan statute giving the State Highway Commissioner and the Wayne County Road Commission, respectively, control of many of the main streets in Detroit; that under the Michigan Home Rule Act and the City Charter the off-street facilities must be operated on a self-liquidating and "utility" basis; that as to two City owned and operated off-street parking facilities the provisions of the City charter requiring special benefit assessments against adjoining property were not being complied with and said facilities were not being taxed as required by Act 286, § 1, Public Acts Mich. 1947. Respondents denied that previous decisions of the Supreme Court between other parties were determinative or conclusive as to them. Appellants' response concluded:

"25. Respondents further allege that the petition herein states no sufficient or proper grounds for issuance of the writs prayed and that, therefore, and for the reasons alleged by respondents in the Circuit Court bill of complaint and in the responses filed herein, said petition should be denied."

Printed briefs were filed, and oral argument in the Supreme Court was had on January 14, 1954. On February 18, 1954 written opinion was filed by the Court, *City of Detroit* v. *Wayne Circuit Judges*, 339 Mich. 62, copy of which is hereto attached, pages 247-254.

IV

Date of Judgment Sought To Be Reviewed and Date of Presentment of Application for Appeal

Judgment of the Supreme Court of Michigan was entered on February 18, 1954. Appellants on March 4, 1954 seasonably filed their application for rehearing which was considered and denied by final order of the Court entered April 6, 1954, which is the date of the final judgment sought to be reviewed. Appellants' application for appeal was presented to Honorable Henry M. Butzel, Chief Justice of the Supreme Court of Michigan, on May 18th, 1954 and was allowed.

The grounds alleged by appellants for such rehearing were that:

> "I. Jurisdictionally, substantively and procedurally, the decision and judgment herein that writs of prohibition and mandamus should issue deny said respondents, and each of them, equal protection of the laws and due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.
>
> "II. Said decision and judgment deprive said respondents of their and each of their property without due process of law, contrary to said Fourteenth Amendment.
>
> "III. Regardless of the foregoing, the decision is prejudicially erroneous in important matters."

Implementing their contentions that they had been denied constitutional rights appellants alleged that the subject matter was within the jurisdiction of the Circuit Court to which jurisdiction the appellees had submitted; that appellants had a right to a hearing, trial and determination of the issues of fact and of law in the circuit court in accordance with the prescribed constitutional and statutory procedure, including the right to amend their complaint and to offer and

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take testimony and submit proofs, subject to no control by the Supreme Court other than on a proper appeal from an order or decree by the Circuit Court; that the proposed financing and acquisition, construction and operation of the City off-street parking facilities would constitute unconstitutional, illegal, wrongful, unfair and destructive competition; that the petition for prohibition was not intended to seek a determination of the merits of the controversy but merely to prevent consideration and determination thereof by the Circuit Court; that the petition raised no question of jurisdiction of the Circuit Court but merely one as to merits; that the statutes and court rules provide that issues of fact raised shall be determined as in other cases and in the county where the facts took place and that

> "to deny respondents such right would be to deny them the equal protection of the laws and to take their property without due process of law, contrary to said Fourteenth Amendment."

On April 6, 1954, the Court, without opinion, entered order denying the application for rehearing (R. 271).

By appellants' Circuit Court bill of complaint, their responses in the Supreme Court prohibition proceedings, and their application for rehearing, there was, in each instance, drawn into question the validity of a statute enacted by the Michigan legislature and of two ordinances enacted by the Common Council of the City of Detroit, on the ground of their repugnancy to the Fourteenth Amendment to the Constitution of the United States.[2]

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[2] Each of such ordinances is a "statute" within the meaning of that term in 28 U. S. C. § 1257.

Jamison v. *State of Texas*, 318 U. S. 413, 63 S. Ct. 669, 87 L. ed. 869; *John P. King Manufacturing Company* v. *City Council of Augusta*, 277 U. S. 100, 114, 48 S. Ct. 489, 72 L. ed. 801, 810; *Beard* v. *City of Alexandria*, 341 U. S. 622, 71 S. Ct. 920, 95 L. ed. 1233.

In the instant case the Revenue Bond Act *requires* implementation by definitive ordinance.

The Supreme Court of Michigan having, nevertheless, upheld the validity of the Revenue Bond Act and of the ordinances, the Supreme Court of the United States has jurisdiction under 28 U. S. C. § 1257(2).

Winters v. *New York*, 333 U. S. 507, 68 S. Ct. 665, 92 L. Ed. 840.

According the Michigan Supreme Court the final word as to the interpretation of the act and ordinances, nevertheless their effect in relation to the federal constitution must be determined by the Supreme Court of the United States.

Crew Levick Company v. *Commonwealth of Pennsylvania*, 245 U. S. 292, 38 S. Ct. 126, 62 L. Ed. 295.

Despite the fact that the Supreme Court of Michigan, in its opinion,[3] made no reference to the federal questions raised by appellants and filed no written opinion in denying rehearing, the Court necessarily passed upon and decided the question of constitutionality of the act and of the ordinances, and disposition of the constitutional questions raised by appellants cannot be rested upon any adequate dispositive non-federal ground. In such circumstances, the Supreme Court of the United States has jurisdiction of an appeal from the resultant judgment.

Chicago, etc. R. Co. v. *Illinois*, 200 U. S. 561, 26 S. Ct. 341, 50 L. Ed. 596. A fortiori, the judgment appealed from herein expressly determined that the responses of the appellants were insufficient, and, consequently, the effect of the judgment was to deny the asserted claims of unconstitutionality and the opinion purports to grant declaratory relief which, necessarily, is predicated upon constitutionality of the act and ordinances.

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[3] Pages 247-254, post.

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In addition to the foregoing basis of jurisdiction of the Supreme Court of the United States, appellants contend that their appeal herein from the final judgment of the Supreme Court of Michigan properly presents, for review, the additional claims, prefaced in their responses and finalized in their application for rehearing, that the judgment denied appellants the right to equal protection of laws and due process of law, etc. under the federal constitution because of assumption of jurisdiction by the Supreme Court of Michigan and its refusal to afford a hearing, trial or determination of the issues of fact involved, and its decision that appellants had no right to litigate and that prior decisions were controlling, and because of the Court's refusal to determine the question as to tax exemption of the City's off-street garages and other facilities and its prohibition against procurement of such determination by appellants in the Circuit Court. We realize that this presents a question of mode and scope of review in the United States Supreme Court.

However, under the peculiar circumstances herein, we believe and contend that appellants are not, as to these additional questions, limited to application for certiorari under 28 U. S. C. § 1257(d), and, therefore, that all of the federal questions raised by them are reviewable by appeal. This belief and contention is based upon the fact that, in reality and in purpose, the petition for prohibition did not seek a trial of the issues of fact and law necessarily involved in appellants' claims, but only sought to bar appellants from obtaining a trial, hearing and determination of any thereof, solely on the claimed grounds that appellants had no right to litigate any of the questions and that all questions so raised by them had been foreclosed by prior decisions. The Supreme Court, against the opposing contentions of appellants, so held, and it is our view that such holding was, and of necessity had to be, predicated upon

the thesis that the Revenue Bond Act and the two ordinances were not repugnant to the federal Constitution, and that the prior decisions settled or should settle that question. In other words, it is our view that the constitutionality of the act and ordinances was necessarily drawn into question and decided by the prohibition judgment, and, therefore, in such aspect, the denials of the federal constitutional rights are reviewable by appeal. While these additional federal questions in no way affect the right of appeal under 28 U. S. C. § 1257(c), ante, they are, in any event, a proper basis of application for certiorari under § 1257(d) and subject to consideration by the Supreme Court of the United States under 28 U. S. C. § 2103.

V

Questions Are Substantial

The following are the grounds upon which appellants contend that the questions involved are substantial:

(a) Neither the State of Michigan nor the City of Detroit has any proprietary right, title or interest in the public streets nor the right to rent the same for the parking or storage of automobiles. Their sole right is that of reasonable regulation of the public use of the streets, under such police power as does not violate individual rights guaranteed by the Constitution of the United States. The situation is not changed by the fact that the City may acquire, own and operate off-street parking facilities, because that right also is exercisable only as a police power. Such right of reasonable regulation of the Detroit streets is greatly exceeded by the unreasonable and unlawful provisions of the two ordinances in question which commit the City, for more than 30 years, not only to continue on-street parking, but also to maintain, substantially undiminished, all present meters for on-street parking and also all other meters for

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such parking hereafter installed, and to collect therefrom unreasonable and excessive profits and net revenues greatly in excess of the reasonable cost of such meter regulation, and additional sums, by increased rates if necessary, to be used for the acquisition, constructing, operation and maintenance of off-street garages and other parking facilities in unlawful, unfair and ruinous competition to appellants and in claimed violation of their rights of equal protection of the laws and due process of law under the Fourteenth Amendment to the Constitution of the United States. Implicit in such constitutional rights is the federal right to judicial determination as to the acts and conduct claimed to be in violation of said Amendment, and to appropriate protective relief if such claim be sustained.

Appellants set forth in their bill of complaint the facts and the provisions of law upon which they based their claim of unconstitutionality of the ordinances and statute. The bill of complaint was filed in the state trial court possessed of subject-matter jurisdiction and which promptly acquired jurisdiction of the defendants therein, appellees herein.

Over that litigation, the Supreme Court of Michigan had no jurisdiction other than as an appellate court upon an appeal from an order or decree of the Circuit Court, and, as to the constitutional questions thus raised, an adverse final judgment of the Supreme Court of Michigan would be reviewable by the United States Supreme Court. Such right of review is no less where the final judgment is entered by the Supreme Court of Michigan in an original proceeding which results in a judgment prohibiting the Circuit Court proceedings, on the ground that appellants had no litigible interest sufficient to raise the constitutional questions, or that such questions were without merit.

(b) Under the Constitution of Michigan the Circuit Court had original jurisdiction to hear, try and determine the issues raised in appellants' bill of complaint filed therein al-

leging the facts upon which appellants relied as showing that no necessity existed for the City's entry into the competitive off-street parking business; that the amount of collections by meters for on-street parking was excessive and was resulting and would continue to result in unlawful profit and net revenue; that because of described conditions in the City it was unreasonable and unlawful for the City to enter into the contract as to maintenance of street parking meters and collections and rates; that the City off-street parking facilities were not, and could not be, self-liquidating as required by the revenue bond act, and that the City illegally had exempted, and intended to continue to exempt, its off-street facilities from taxation. Nevertheless, at the instance of the defendants named in said bill of complaint, appellees here, and in a summary non-appellate proceeding, claimed by appellants to be beyond the jurisdiction of the Supreme Court of Michigan, that Court denied appellants the right to proceed in the Circuit Court and there to offer evidence as to the alleged facts upon which unconstitutionality of the ordinances and state statute were largely based, and also denied appellants a right to a hearing, trial and determination of such issues in the Supreme Court and also refused, itself, to determine the question as to tax exemption of the City off-street parking facilities involved, or to permit appellants to litigate that question elsewhere. The result is that the important and relevant issues of fact raised by appellants bearing on claimed unconstitutionality of the ordinances and statute have not been legally heard, tried or determined, but such trial, etc., as well as litigation of the question as to tax exemption, have been barred.

(c) The Supreme Court of Michigan had not previously heard or determined any of the questions presented by appellants in a case involving appellants or any other person financially, personally or peculiarly affected by the or any similar ordinance or by the revenue bond act, or who in any

manner would be affected by the competition contemplated thereby, nor, to our knowledge, has any of such questions been determined by the Supreme Court of the United States. Appellants are, as to the questions raised, the persons most directly, vitally, particularly and peculiarly interested and affected. Consequently, constitutional questions raised by appellants herein and in their bill of complaint, their responses in the Supreme Court of Michigan, and in their application for rehearing, are not frivolous or unsubstantial.

(d) The constitutional questions raised by appellants were necessarily drawn in question in the decision and judgment of the Supreme Court of Michigan, and the adverse decision thereof cannot be rested upon any adequate non-federal ground.

It is, therefore, respectfully submitted that the Supreme Court of the United States has jurisdiction of the appeal herein.

Dated May 18, 1954.

GEORGE E. BRAND,
GEORGE E. BRAND, JR.,
Attorneys for Appellants.

APPENDIX "A"

SUPREME COURT OF MICHIGAN

In the Matter of the Petition of the CITY OF DETROIT, a Municipal Corporation, JOHN H. WITHERSPOON, Controller of the City of Detroit, JAMES A. HOYE, Deputy Commissioner and Director of Traffic of the Police Department of the City of Detroit

OPINION—Filed February 18, 1954

Before the Entire Bench

BOYLES, *J.:*

The city of Detroit files here a petition for writs of prohibition and mandamus, to prevent the circuit judges in Wayne county, and the plaintiffs in a certain chancery case now pending in their court, from taking any further steps or proceedings in said case. We issued an order to said defendants to show cause why the petition should not be granted. Responses have been filed, briefs filed by the parties and by *amici curiae* by leave of court, and oral arguments heard.

The bill of complaint in said case was filed December 15, 1953, by the Service Parking Grounds, a Michigan corporation, and 15 other owners or operators of privately-owned automobile parking lots in Detroit, to obtain a declaratory decree holding that proceeds from parking meters for on-street automobile parking in Detroit cannot be legally combined with those from city-owned off-street parking facilities for bond financing; that money collected from street parking meters cannot legally be used for off-street parking facilities; that Detroit ordinances 672-E and 804-E, which provide for acquiring off-street parking facilities and for issuing revenue bonds to finance the same, are invalid; and to declare that off-street parking facilities cannot be legally exempted from taxation. (This final question is premature and does not require consideration now. But see CL 1948, § 141.161 [Stat. Ann. 1949 Rev. § 5.2426(1)].)

The bill of complaint further asks that the city be en-

joined from consummating the revenue bond financing for municipal off-street parking contemplated by the city, as provided for in said 2 city ordinances; from using money collected from street parking meters for municipal off-street parking facilities; and from using any surplus money from street parking meters to pay revenue bonds and interest.

No answer has been filed to said bill of complaint. On December 30, 1953, the city filed a motion to dismiss the case, which, however, has not been brought on for hearing. Instead, on January 11, 1954, the city filed in this Court the instant petition for a writ of prohibition to prevent further proceedings on said bill of complaint and for mandamus to require the circuit judges to dismiss the case. The controlling question is whether the bill of complaint sets up proper and sufficient grounds for the declaratory decree and the injunctive relief sought. The city claims that it has been filed purposely to delay the revenue bond financing.

Detroit is a home-rule city. By charter,* it has been authorized to acquire, establish, operate and maintain facilities for the parking of automobiles and to acquire the necessary land therefor. Such a provision in the city charter is authorized by the home-rule act, as follows:**

> "Each city may in its charter provide: * * *
>
> "(6) For the acquiring, establishment, operation, extension and maintenance of facilities for the storage and parking of vehicles within its corporate limits, including the fixing and collection of charges for services and use thereof on a public utility basis, and for such purpose to acquire by gift, purchase, condemnation or otherwise the land necessary therefor."

The city is also similarly authorized by the revenue bond act, as follows:***

> "Any public corporation is authorized to * * * acquire * * * 1 or more public improvements and to

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* Detroit charter, title 3, ch. 1, § 12(v).

** CL 1948, § 117.4h (Stat. Ann. 1949 Rev. § 5.2081).

*** PA 1933, No. 94, as last amended by PA 1947, No. 204 (CL 1948, § 141.104 [Stat. Ann. 1949 Rev. § 5.2734]).

own, operate and maintain the same, within and/or without its corporate limits, and to furnish the services, facilities and commodities of any such public improvement to users within and/or without its corporate limits: • • •

"(d) No commercial enterprises, other than the parking or storage of motor vehicles, shall be conducted or authorized at or upon any automobile parking facility authorized under the provisions of this act.

"The powers in this act granted may be exercised notwithstanding no bonds are issued hereunder."

In 1947 the city adopted ordinance 213-E creating a municipal parking authority, to have general supervision over all municipally-owned facilities for parking and storage of motor vehicles. In 1948 the city adopted ordinance 236-E amending a previous ordinance and providing that the coins collected from parking meters be deposited in a special parking meter fund to be used for the cost of acquiring and installing parking meters, cost of supervision, inspection, maintenance, supply of parts, cost of collection, and enforcement of the ordinance. It further provided as follows:

"Any balance remaining after use of the funds as hereinbefore provided, shall be used, upon due appropriation by the common council, for the acquisition and installation of other traffic control devices and for the acquisition, construction and operation of off-street parking facilities."

In 1952 the city adopted ordinance 672-E. After reciting that the city was in urgent need of providing accessible off-street parking facilities to relieve congestion, the ordinance provided for acquiring off-street parking facilities. It further provided that parking facilities, both on-street and off-street, should be operated as a single automobile parking system, and for issuing revenue bonds to pay the cost of acquiring and maintaining off-street parking facilities. In 1953, effective December 10th, the city adopted ordinance 804-E, amending ordinance 672-E above referred

to. Essentially, it continued in effect the previous provisions authorizing the acquisition and operation of off-street parking facilities, the use of parking meter revenues and funds then or thereafter in the city treasury for those purposes, and the issuing of additional revenue bonds in the amount of $2,400,000 to pay for the cost of acquiring and making available for use the municipal off-street parking facilities therein referred to.

The plaintiffs, operators of privately-owned automobile parking lots, by their bill of complaint claim that the 2 city ordinances, 672-E and 804-E, above referred to are invalid and that the city does not have the right to acquire, operate and maintain off-street automobile parking facilities or to issue revenue bonds for that purpose. Succinctly stated in their bill of complaint, the plaintiffs' claim is as follows:

> "Under the circumstances, ordinances Nos. 672-E and 804-E illegally bind the city of Detroit to subsidize each and every of said off-street facilities out of the excess money being or to be collected by the on-street parking meters and to pay the deficiencies in maintenance, operation and taxes of each of said facilities and to pay the principal of, and interest on, the revenue bonds out of said meter money, and to maintain said meters and such charges as may become necessary to meet said deficiencies for 30 years or until all bonds and interest shall be paid in full regardless of the advisability of maintaining said meters upon the city streets and regardless of the expense of said regulation.
>
> • • •
>
> "The city of Detroit has no right or power to acquire, own, maintain or operate off-street automobile parking facilities, either as contemplated by said ordinances or otherwise."

Plaintiffs' claims have been answered in the negative by several decisions of this Court where the same questions were involved.

Automobile parking meters are a "public improvement" within the meaning of the revenue bond act, although not a "public utility." Control of and revenue from street parking meters may be legally combined with municipally-owned-and-operated off-street parking facilities within said act, for the purpose of financing by the issuance of revenue bonds. Money collected from street parking meters may be used for off-street municipally-owned parking facilities. The expenditure of public funds to acquire and operate off-street parking facilities involves public safety and is lawful. *Wayne Village President v. Wayne Village Clerk*, 323 Mich. 592. The minor variations between the instant situation and that in the *Wayne Village Case*, claimed by counsel for the plaintiffs, have no material bearing on the conclusions reached in that case.

Detroit city ordinances 672-E and 804-E, the legality of which is challenged by the plaintiffs in the chancery case, are copied from and are substantially the same as the ordinances considered by the Court in the *Wayne Village Case, supra*, and are the same ordinances which were under like attack and held valid by this Court in *Cleveland v. City of Detroit*, 324 Mich. 527. There is no merit in plaintiffs' present claim that the city cannot legally collect surplus or "profit" money from street parking meters, to be used to finance off-street parking facilities. *Wayne Village President v. Wayne Village Clerk, supra; Bowers v. City of Muskegon*, 305 Mich. 676. The question whether or not the parking facilities will be operated at a profit is an administrative problem for the legislature and the municipal authorities. It is not a matter primarily to be decided by the courts.

In their bill of complaint the parking lot owners have set up at length the value and extent of their properties, their dependency on profitable operation of their parking facilities, and their loss or damage if the city is allowed to enter into competition with their business by off-street automobile parking. They ask that the city be enjoined from acquiring and operating off-street parking facilities because of those facts and circumstances. They claim that Detroit lacks authority to engage in a public improvement, such as

automobile off-street parking, in competition with them, to their financial damage and loss. This Court has held to the contrary:

> "In the exercise of proprietary and business powers of a municipal corporation, it is governed by the same rules which control a private individual or a business corporation: in such case the fact that a city engaging in a commercial line of activity competes with and damages one of its inhabitants in his trade or business does not entitle him to relief against municipal action for the city owes him no immunity from competition." *Andrews v. City of South Haven* (syllabus), 187 Mich. 294.

The proviso in the revenue bond act hereinbefore quoted indicates that off-street parking is considered as a "commercial enterprise" which a municipality is authorized to acquire. In authorizing parking "without the corporate limits," it contemplates off-street parking. A municipality does not have city streets outside the corporate limits.

Counsel for the city claim that the writ of prohibition should issue because of the lack of proper parties plaintiff, seeking relief as taxpayers. Assuming that the plaintiffs by their bill of complaint are seeking injunctive relief against the city, *as taxpayers*, counsel for the city argue that the plaintiffs should be prohibited from maintaining their bill of complaint because, as taxpayers, they have no standing in court. Were this the only question involved, we would agree to granting the writ to compel dismissal of the bill of complaint on that ground, having recently so held in *Menendez v. City of Detroit*, 337 Mich. 476, and *Nichols v. State Administrative Board*, 338 Mich. 617.

However, it should be noted that the plaintiffs, in their bill of complaint, ask for a declaratory decree, to settle controlling questions of law; and counsel for the city likewise ask that we decide the merits of the questions raised here in order to have an early decision, because of the need for prompt relief of congested traffic and parking conditions in Detroit and to avoid any further delay in the issuance of revenue bonds. With that in mind, instead of taking a short cut by deciding the matter on the ground that the plaintiffs

have no standing in court, we have concluded to follow the method recently adopted in the *Nichols Case, supra,* and decide the merits of the questions raised.

The writs of prohibition and madamus will issue. No costs, a public question being involved.

EMERSON R. BOYLES,
GEORGE E. BUSHNELL,
HENRY M. BUTZEL,
LELAND W. CARR,
EDWARD M. SHARPE,
NEIL E. REID,
HARRY F. KELLY,
JOHN R. DETHMERS.

(6037)

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FILE
JUN 21
HAROLD B. WILL

No. 152

In The

Supreme Court of the United States

October Term, 1953

City of Detroit, John H. Witherspoon, Controller, and James A. Hoye, Deputy Commissioner and Director of Traffic of the Police Department of said City of Detroit,
Plaintiffs-Appellees,

v.

Ira W. Jayne, Chester P. O'Hara, et al, Judges of the Circuit Court for Wayne County, Michigan,
Defendants,

Service Parking Grounds, Civic Center Garage, Inc., Madison Parking Co., Parking Realty Company, Parking Investment Corporation, Park Place Corporation, Theatre Parking, Inc., Union Parking Company, Incorporated (all Michigan corporations), Joseph Fee and Beulah Fee, co-partners as Willis Parking Co., Hyman Miller and Tillie Miller, copartners as Jefferson Parking, Sidney Pozen, d/b/a Sidmar Parking Co., George Salloum, d/b/a Fox Parking Co., George Rashid, d/b/a Bagley Parking Co., Samuel C. Binkow, M. Bertha Binkow, Joseph Katchke copartners as Briggs Parking, and Lottie Feldman,
Defendants-Appellants.

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS APPEAL OR TO AFFIRM

GEORGE E. BRAND,
GEORGE E. BRAND, Jr.,
Attorneys for Appellants.

MOERS, INC., 905 HENRY ST., DETROIT, MICH.

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Statement as to and grounds of appellees' motion to dismiss appeal or affirm 1

APPELLANTS' CONTENTIONS AND ARGUMENT

Appeal - Certiorari

Appeal, not certiorari is appellants' remedy to review the federal question as to the constitutionality of the statutes and ordinances. The prohibition order can be justified only on the theory that the statutes and ordinances were not repugnant to the 14th Amendment. 2-4

Lack of Federal Question

Appellees base their contention that no substantial federal question was or is involved upon the sole ground that appellants had no litigable interest, because of prior Michigan decisions in litigation by other parties, and that this involved only a question of local law. 4-5

Appellees' petition for prohibition sought no determination on the *merits* of the controversy presented by appellants' bill of complaint nor a trial of determinative issues of fact. They sought only to bar appellants from litigating any issues in any court, including, presently, the Supreme Court of the United States. 4-5

Appellees, through prohibition procedure, sought to bar appellants from a judicial determination of the constitutionality of the statutes and ordinances, a federal question as to which the Supreme Court of Michigan lacks the power of final determination. 5-6

Appellees contend that unless a tax or a tax liability is involved an operator of a private business cannot question competition by a municipality. The error therein is that the only permissible municipal competition is that which is lawful, and to hold that a private business operator, who claims municipal

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competition is unlawful because the statute and ordinances which make the competition possible and effective are repugnant to the federal constitution, can be barred from presenting his claim to a court for decision, is tantamount to saying that the interpretation and enforcement of a federal constitutional right is a local question finally determinable in the state court. 6-7

The Supreme Court of Michigan, inevitably passed upon the federal questions. Appellees' contentions that the decision of that court is sustainable on a local non-federal question is obviously erroneous. The matter of a litigants' qualification and right to raise a federal constitutional question is itself a federal question. 7

The Supreme Court of the United States has the right of final determination of the federal questions. 7-8

Appellees do not deny that appellants were denied a determination of the right to litigate the claim that the city's off-street garages could not legally be exempted from taxation; nor do they offer support for such denial. The question as to tax exexemption has never been judicially determined. 9

Without permitting any hearing as to the facts bearing on the validity of the statutes and ordinances, the Michigan court gave appellees declaratory relief contrary to appellants' constitutional rights. 9

Prohibition - Procedure

Appellants' bill of complaint presented an equitable controversy of a type, as to subject-matter and parties and as to injunctive and declarative relief sought, unquestionably within the constitutional jurisdiction of the circuit court. But the Supreme Court of Michigan had no original equitable jurisdiction, and in such a matter its jurisdiction was solely appellate. 10

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The test as to the jurisdiction of the circuit court is whether a controversy is within the general class of controversies over which that court has jurisdiction; not whether a plaintiff has the right to relief in a particular case. 11

Prohibition against a judicial tribunal lies only against the exercise of non-existent jurisdiction or an excess of jurisdiction. 11-14

The sole ground upon which appellees alleged that the Supreme Court of Michigan had jurisdiction to order prohibition was that the circuit court was wholly without jurisdiction—for the reason that appellants (plaintiffs in that court) were not proper parties, having no litigable interest. 14

The petition for prohibition disclosed no basis of original Supreme Court jurisidiction, and what appellees alleged as the sole reason for lack of circuit court jurisdiction presented no question of *jurisdiction*, but only of *merits*, presentable to the Supreme Court of Michigan only on appeal. 14-15

Appellants' litigable status could not be determined adversely without deciding against the constitutional rights which they claimed. 15

The interpretation of prior decisions and their application to factual situations developed by evidence is recognized trial court function to which appellants were entitled under the equal protection and due process of laws provisions of the federal constitution. The Supreme Court of Michigan lacked jurisdiction to displace the circuit court. 16

Prior Michigan Cases

Analysis of the six cases upon which the Michigan court predicated its judgment and upon which the appellees rely. 17-19

There was no basis for applying the principles of res judicata or of collateral estoppel, because appellants were not parties to any of the prior cases, and no bar to exercise of the power of the Supreme

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Court of the United States to review a state court judgment denying a federal right can be predicated upon a state court adjudication thereof. 19-20

The facts and issues in the six prior cases differed materially from those in appellants' case; the prior cases did not and could not determine the important questions raised by appellants; none of the cases determined that there was a jurisdictional impediment to the exercise of circuit court jurisdiction nor a basis for investing the Supreme Court of Michigan with plenary prohibition powers, and no settled pattern of Michigan decisions as to the issues presented by appellants has emerged therefrom. 21

No case in which a trial of the issues presented by appellants has been decided by a Michigan trial court; in no other case has a litigant asserting like or similar rights or claims been denied the right to a trial thereof; there has been no review of any of the prior cases by the United States Supreme Court nor has it decided any of the questions raised by appellants as to the constitutionality of the statutes or ordinances. 21-22

Appellees misconcieve the principle and essence of the equal protection and due process of law provisions of the federal constitution. The requirement of equal protection of laws inhibits discriminatingly barring a litigant from access to the court 22

Viewed from any angle the statute and ordinances were upheld against claimed repugnancy to the federal constitution and by a procedure that denied appellants equal protection and due process of law guaranteed by that constitution. 22

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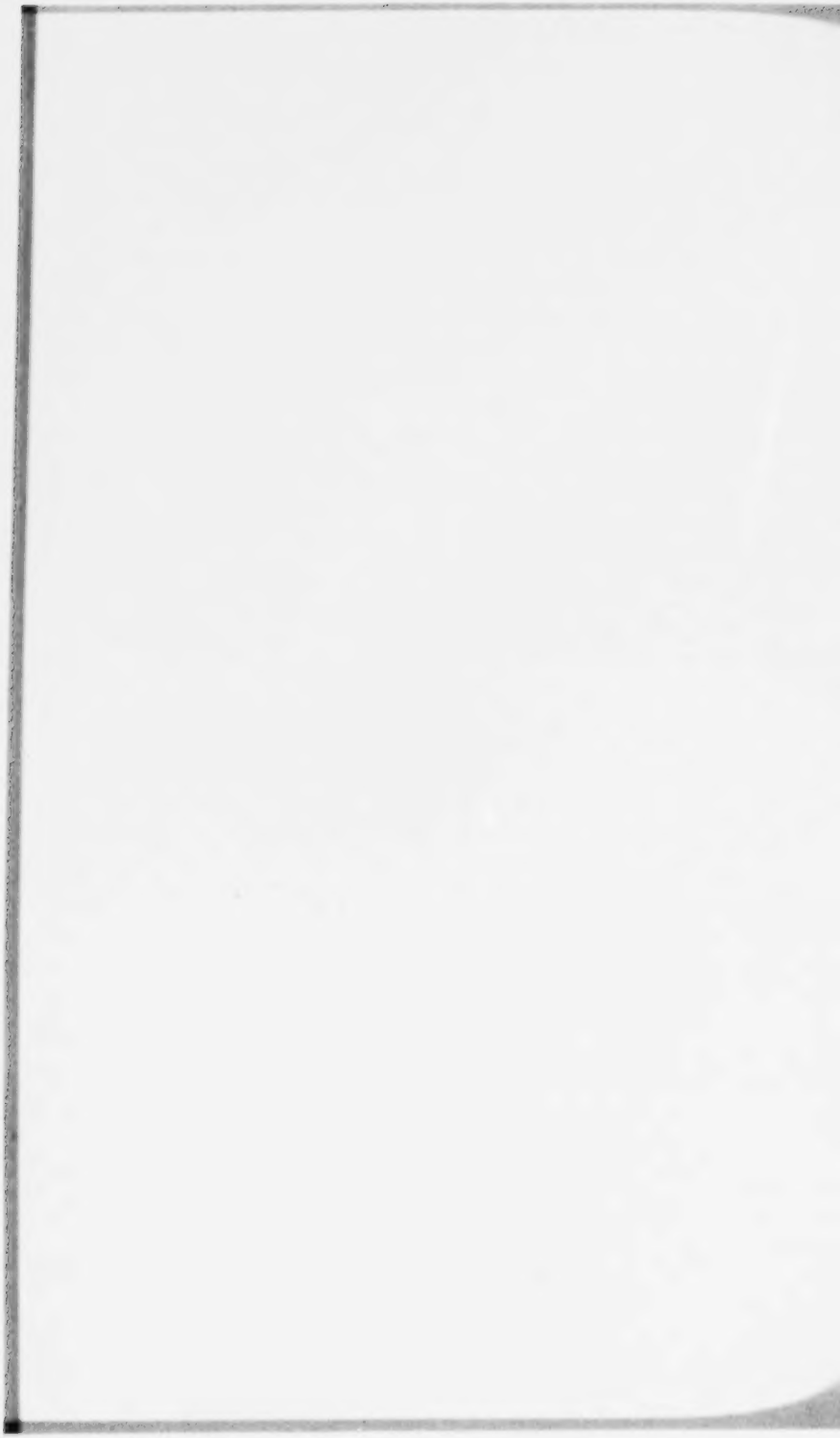

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In The

Supreme Court of the United States

October Term, 1953

No.

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Plaintiffs-Appellees,

v.

Ira W. Jayne, Chester P. O'Hara, et al, Judges of the Circuit Court for Wayne County, Michigan,
Defendants,

Service Parking Grounds, Civic Center Garage, Inc., Madison Parking Co., Parking Realty Company, Parking Investment Corporation, Park Place Corporation, Theatre Parking, Inc., Union Parking Company, Incorporated (all Michigan corporations), Joseph Fee and Beulah Fee, co-partners as Willis Parking Co., Hyman Miller and Tillie Miller, copartners as Jefferson Parking, Sidney Pozen, d/b/a Sidmar Parking Co., George Salloum, d/b/a Fox Parking Co., George Rashid, d/b/a Bagley Parking Co., Samuel C. Binkow, M. Bertha Binkow, Joseph Katchke copartners as Briggs Parking, and Lottie Feldman,
Defendants-Appellants.

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS APPEAL OR TO AFFIRM

Appellees have moved to dismiss appeal from, or to affirm, a judgment entered in an original proceeding in the Michigan Supreme Court, prohibiting appellants, the owners and operators of off-street automobile parking facilities, from prosecuting their circuit court chancery suit against appellees, a municipality and its officers, in which suit appellants claim that the municipality is unlawfully competing with them perforce provisions of state

statutes and municipal ordinances alleged to be in excess of the legitimate police power and repugnant to the Fourteenth Amendment. In their statement opposing jurisdiction appellees do not, and cannot, controvert or impugn appellants' jurisdictional statement showing that the essence of appellants' bill of complaint and of their responses in the prohibition proceedings was the claimed invalidity of the statutes and ordinances on the ground of repugnancy thereof to the federal constitution. Uncontrovertibly, a primary and basic federal question as to the constitutionality of the statutes and ordinances was instilled at the outset and was persistently maintained. Decision was in favor of validity.

Grounds of Appellees' Motion

The stated grounds of appellees' motion to dismiss the appeal or to affirm are the four they list under the heading "Issues."

Appeal - Certiorari

The first ground is that certiorari, not appeal, is the remedy. Facts and court decisions referred to in appellants' jurisdictional statement establish the contrary. The *Bullock case*, upon which appellees rely, did not involve any attack on the constitutionality of a state statute, but an entirely different kind of federal question.[1]

Appeal not only appears to be the proper remedy to review the federal question herein as to the constitutionality of the statutes and ordinances, but also the other constitutional questions which developed by reason of the prohibition proceedings. In fact, the prohibition order, which

[1] *Bullock v. Florida ex rel. Railroad Comm.*, 254 US 513, 41 S Ct 193, 65 L ed 380, involved the validity of a provision of a trial court foreclosure decree. Prohibition by the state supreme court was in the nature of an appeal therefrom. Certiorari was granted by the Supreme Court of the United States.

appellees admit this court has certiorari jurisdiction to review, can be justified only on the theory that the statutes and ordinances attacked in both the circuit and supreme courts are not repugnant to the Fourteenth Amendment. The validity of the revenue bond act and the city ordinances having been drawn into question on the ground of claimed repugnancy thereof to the Fourteenth Amendment, and upheld by the Michigan court, the Supreme Court of the United States has jurisdiction on appeal under 28 USC § 1257(2):

> *Western Turf Association v. Greenberg*, 204 US 359, 27 S Ct. 384, 51 L ed 520, that a state court judgment sustaining the validity of a state statute as a valid exercise of police power, against a claim of repugnancy to the Fourteenth Amendment, is reviewable on writ of error.
>
> *Municipal Investors Ass'n v. City of Birmingham*, 316 US 153, 62 S Ct 975, 86 L ed 1341.
>
> *Winters v. People of State of New York*, 333 US 507, 68 S Ct 665, 92 L ed 840.
>
> *Illinois v. Board of Education*, 333 US 203, 68 S Ct 461, 92 L ed 649, motion to dismiss appeal denied.
>
> *Kovacs v. Cooper*, 336 US 77, 69 S Ct 448, 93 L ed 513.
>
> *Breard v. City of Alexandria*, 341 US 622, 71 S Ct 920, 95 L ed 1233.
>
> *Poulos v. New Hampshire*, 345 US 395, 73 S Ct 760, 97 L ed 1105:
>
> > "This analysis showing an attack on the ordinance as applied as repugnant to the principles of the First Amendment and a determination of its validity by the New Hampshire Supreme Court requires us to take jurisdiction by appeal."[2]
>
> *Brown v. Board of Education of Topeka*, — US —, 98 L ed (Advance p. 583).

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[2] Citing *King Mfg. Co. v. Augusta*, 277 US 100, 48 S Ct 489, 72 L ed 801 and *Jamison v. Texas*, 318 US 413, 62 S Ct 669, 87 L ed 869.

The second ground of appellees' motion pertains to the constitutionality of the prohibition proceedings. Discussion thereof is deferred to pages 10-22, post.

Lack of Federal Question

The third and fourth grounds of appellees' motion are:

> "(3) No decision of a federal question was involved, necessary or controlling in the determination of the cause by the Supreme Court of Michigan.
>
> "(4) The appellants were not deprived of due process of law or equal protection under the Federal Constitution by the ordinances or laws, the validity of which was challenged in the circuit court proceeding."

It is on *these* grounds only that appellees conclude that "appellants have failed to raise a substantial federal question" and, as will presently be pointed out, ground (4) is restricted by appellees' argument thereof.

Analysis of these grounds makes it clear just what was the limited basis and the broad objective of the extraordinary prohibition proceeding, and precisely what appellees' motion seeks to have the Supreme Court of the United States do. That can be brought into bold relief by first referring, briefly, to the relief sought by appellees in the prohibition proceedings.

Appellees' petition for prohibition shows clearly that appellees were not endeavoring to obtain from the Supreme Court of Michigan a determination on the *merits* of the controversy which would be dependent upon the factual situation presented to the circuit court by the bill of complaint, nor to have any court trial of such issues, but that

appellees were seeking to bar appellants from litigating any issues in any court (including, presently, the Supreme Court of the United States) on the sole ground that appellants had no litigable interest because, in other cases among other parties, the Supreme Court of Michigan had held that: (a) a mere taxpayer could not attack a revenue bond financing, (b) an operator of a private business had no right of immunity from [any] competition by a municipality and (c), such questions had been sufficiently litigated to justify a halt of further controversy thereover. (See petition, paragraphs 10-11, R. 11-13). Although the petition *as to facts*, was implemented by various affidavits (R. 17-20, 148-151) and newspaper clippings (R. 153-192) and by extensive answer to appellants' responses (R. 232-246), appellees denied that the trial of any issue of fact was required, and alleged that final decision could and should be made on the [adjudicated] law (R. 234-235); a contention which appellants controverted throughout (R. 199-200, 265-266).

What the appellees were seeking through the prohibition procedure was to deprive the appellants of their day in court and to bar them from seeking or obtaining a judicial determination of their claim that the revenue bond financing statutes and ordinances violated appellants' rights under the constitution of the United States—a federal question and a federal right as to which the Supreme Court of Michigan lacks the power of final determination.

The two grounds of appellees' motion, amplified by their argument thereof, clearly disclose the erroneous rationalization which, thus far, has produced the result which appellees set out to accomplish, and which their motion seeks to perpetuate.

In substance, the contentions of appellees in their motion are that:

(a) *Final determination has been made in prior* cases among other parties that unless a tax or tax liability is involved, a taxpayer cannot question the validity of municipal revenue bond financing, and, in no event has an operator of a private business any immunity against municipal competition; and that the determination of these matters, in each instance, is solely of local law and does not involve any federal question.

(b) The Supreme Court of Michigan *did not decide any federal question* by its decision that the lower court had no jurisdiction, and that appellants had no right, in the Supreme Court prohibition proceeding, to litigate the questions which appellants presented.

(c) If, however, the Supreme Court of Michigan did decide a federal question, it was neither necessary nor controlling, because the question of appellants' litigable status was one of local law and was adequately dispositive.

The fundamental error in appellees' contention is that the only permissible municipal competition with private business is that which is lawful in character. To hold that the operator of a private business, who claims that a municipal competition is unlawful because the statute and ordinances which make such competition possible and effective are repugnant to the federal constitution, can be barred from presenting his claim to a court for decision, is tantamount to saying that the interpretation and enforcement of federal constitutional rights is a local question, finally determinable in the state court.

Appellees remove any doubt as to the erroneous theory upon which they induced the Supreme Court of Michigan to grant prohibition, i. e., that by reason of previous decisions by the Michigan court appellants had no standing either in the circuit court or in the prohibition proceedings to secure a determination of their federal constitutional rights.

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In determining that appellants should be prohibited from proceeding in the circuit court, and that appellants had no right in the prohibition proceeding to a trial of the issues of fact or on the merits (but that appellees should have declaratory relief) the Supreme Court of Michigan, inevitably, passed upon the federal questions. Appeal would lie if the Supreme Court of Michigan, as an appellate court, had entered the same judgment upon appeal from a judgment of the circuit court or, in an original proceeding, had entered such judgment after a full trial in the Supreme Court.

Appellees' contention that the decision of the Supreme Court of Michigan is sustainable on a local, non-federal question, is predicated upon the obviously erroneous concept that the qualification and right of a litigant to raise a federal constitutional question is merely a question under local law. On the contrary, the matter of such qualification and rights presents, per se and perforce, a federal question, whether the judgment denying such qualification and right is predicated upon former decisions or upon decision anew.

Angel v. Bullington, 330 US 183, 189, 67 S Ct 657, 91 L ed 832, 836 (italics added):

> "But whether the claims are based on a federal right or are merely of local concern is itself a federal question on which this Court, and not the Supreme Court of North Carolina, has the last say. *That Court could not put a federal claim aside as though it were not in litigation, by the talismanic word 'jurisdiction.'* When an asserted federal right is denied; the sufficiency of the grounds of denial is for this Court to decide. * * * Bullington could have come here, nor merely by the grace of this Court on certiorari, but on appeal * * *."

We have no disagreement with appellees' contention that, to be reviewable in the Supreme Court of the United States, a federal question must have been presented and

actually decided, or that the judgment could not have been rendered without deciding such question. Such requirements were met in the instant case. What appellants do disagree with, however, is appellees' contention that the decision and order of the Supreme Court of Michigan are sustainable solely on matters of local law, independently of the federal constitutional question. The federal right asserted by appellants has its source in, and receives its vitality from, the federal constitution, not local enactment. Appellees' error is self-evident. The prohibition proceeding was planted and conducted on the erroneous basis, and the contention completely ignores the fact that not only was decision of the federal question essential to the prohibition judgment, but the Supreme Court of the United States, not the Supreme Court of Michigan, has the right of its final determination.

Crew Levick Company v. Commonwealth of Pennsylvania, 245 US 292, 38 S Ct 126, 62 L ed 295:

> "As in other cases of this character, we accept the decision of the state court of last resort respecting the proper construction of the statute, but are in duty bound to determine the questions raised under the Federal Constitution upon our own judgment of the actual operation and effect of the tax, irrespective of the form it bears or how it is characterized by the state courts." (Citing cases)

Accord:

Storaasli v. State of Minnesota, 283 US 57, 51 S Ct 354, 75 L ed 839.

United States v. Pink, 315 US 203, 62 S Ct 552, 86 L ed 796, page 19, post.

Winters v. People of State of New York, 333 US 507, 68 S Ct 665, 92 L ed 840.

Feiner v. State of New York, 340 US 315, 71 St Ct 303, 95 L ed 295.

Niemotko v. State of Maryland, 340 US 268, 71 S Ct 325, 95 L ed 267.

Appellees make no attempt to contradict the allegation of appellants' jurisdictional statement in respect of the refusal of the Supreme Court of Michigan to pass upon, or to permit appellants to litigate, the question of tax exemption of city off-street automobile parking facilities and the unlawful competition resulting from open disregard of the statutory mandate that such facilities be taxed. They make no claim that the tax question has ever been determined and offer no support for the Court's refusal. Moreover, and without according a hearing of the important facts involving the application of the two ordinances and the impact thereof upon the appellants, the Michigan court gave *appellees* declaratory relief vitally affecting appellants and contrary to their federal constitutional rights.

Appellants' application for rehearing (R. 257-258, 266-267) asserted the additional federal questions as to due process and equal protection of law arising from the unusual disposition of case; thus augmenting the appellate jurisidiction of the Supreme Court of the United States in the matter.

Saunders v. Shaw, 244 US 317, 37 S Ct 638, 61 L ed 1163, holding that an appellate court judgment which affirmed a ruling of the lower court that appellant had no right to present evidence on a certain issue, could be reviewed on writ of error as a claimed denial of due process of law.

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 US 673, 50 S Ct 451, 74 L ed 1107.

Prohibition - Procedure

The second ground of appellees' motion is that the prohibition judgment did not deprive appellants of federal constitutional rights of due process and equal protection of law. On page 16, post, we deal with appellee' explanation and argument of this ground.

The bill of complaint presented an equitable controversy of a type that, as to subject-matter and parties and as to injunctive and declarative relief thereby sought, was unquestionably within the jurisdiction of the Circuit Court for Wayne County Michigan, in Chancery.[3] The controversy set forth therein was an actual one, and the matters complained of vitally affected appellants, their rights, business and properties. The controversy presented by the bill of complaint was of a class traditionally within circuit jurisdiction, i. e., bill to enjoin enforcement of city ordinances claimed to be in excess of police and other power of a municipality, and the resultant unfair business competition with the plaintiffs; also to obtain relevant declaration of rights involved.

On the other hand, the Supreme Court of Michigan had no original equitable jurisdiction, either under the Michigan Constitution or statute.[4] Its jurisdiction in such a matter was solely appellate.

Stephenson v. Golden, 279 Mich. 710, 732.

Grand Rapids, G.H. & M.R. Co. v. Stevens, 143 Mich. 646.

Traverse City K. & G. R. Co. v. Seymour, 81 Mich. 378.

Bank of Michigan v. Niles, Walk. 398.

Bailey v. DeGraff, 2 Doug. 169.

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[3] Art. VII, § 10 Constitution of Michigan; § 606.4 Michigan Compiled Laws 1948, § 27.545 Michigan Statutes Annotated.

[4] Art. VII, § 4 Constitution of Michigan; § 601.9 Michigan Compiled Laws 1948; § 27.29 Michigan Statutes Annotated.

The test as to circuit court subject-matter jurisdiction is whether a controversy is within the general class of controversies over which that court has jurisdiction; not whether a plaintiff has a right to relief in a particular case. This is settled in Michigan.

Jay v. Two-Bit Corporation, 287 Mich. 244, 253.[5]

Prohibition against a judicial tribunal does not lie except against the exercise of *non-existent* jurisdiction or an *excess* of jurisdiction.'[6]

This is a well recognized principle of both state and federal jurisprudence.

Bankers Life and Casualty Company v. Holland, — US —, 98 L ed (Advance p. 85) involving a writ of mandamus:

> "The All Writs Act grants to the federal courts the power to issue 'all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.' 28 USC § 1651(a). As was pointed out in *Roche v. Evaporated Milk Asso.* 319 US 21, 26, 87 L ed 1185, 1190, 63 S Ct 938 (1943), the 'traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' * * *
>
> "It is urged, however, that the use of the writ of mandamus is appropriate here 'to prevent judicial inconvenience and hardship' occasioned by appeal being delayed until after final judgment. But it is established that the extraordinary writs cannot be used as a substitute for appeal, *Ex parte Fahey*, 332 US 258,

[5] Appellees in the instant case, without special appearance, actually invoked the jurisdiction of the circuit court by moving therein to dismiss appellants' bill of complaint on non-jurisdictional and claimed jurisdictional grounds.

[6] The mandamus sought by appellees herein was only incidental to prohibition and was to require the circuit court to dismiss appellants' bill of complaint. Mandamus does not lie against private individuals. *Thomas v. Hamilton*, 101 Mich. 387.

260, 91 L ed 2041-2043, 67 S Ct 1558 (1947), even though hardship may result from delay and perhaps unnecessary trial, *United States Alkali Export Asso. v. United States*, 325 US 196, 202, 203, 89 L ed 1554, 1560, 1561, 65 S Ct 1120 (1945); *Roche v. Evaporated Milk Asso. supra* (319 US at 31); and whatever may be done without the writ may not be done with it. *Ex parte Rowland*, 104 US 604, 617, 26 L ed 861, 866 (1882). * * *

"We adhere to the language of this Court in *Ex parte Fahey, supra* (322 US at 259, 260):

" 'Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy . . . . As extraordinary causes.' "

Second National Bank & Trust Co. v. Wayne Circuit Judge (1948), 321 Mich. 28, 45-46:

"The generally accepted rule is that the writ of prohibition is the appropriate remedy only where the court is acting entirely without jurisdiction or in clear excess of its jurisdiction."

Rogers v. Wayne Circuit Judge (1928), 243 Mich. 703, 705. Prohibition sought in the Supreme Court to enjoin circuit court injunction suits. In denying prohibition the Supreme Court said (italicts added):

"Upon a motion to dismiss filed in the court below, this question may be there decided, and, upon appeal to this court from such decision, we may finally dispose of it. *Manifestly, that court has the power, the jurisdiction, to decide the question.* The cases there pending are injunction cases pure and simple, they belong to the class of cases that court has jurisdiction to hear and dispose of. The writ of prohibition is an extraordinary writ and should not and will not be granted where the petitioner has an adequate remedy

by some other proceedings. In *People v. Wayne Circuit Court*, 11 Mich. 393 (83 Am. Dec. 754), it was held (quoting from the syllabus):

'The writ of prohibition can not be issued to restrain any action of inferior courts which can be reviewed by any of the ordinary methods.'

"And in *Hudson v. Judge of Superior Court*, 42 Mich. 239, it was held (likewise quoting from the syllabus):

'A writ of prohibition is a common-law preventive against the encroachment, excess or improper assumption of jurisdiction, and can only be resorted to in clear cases and where other remedies are ineffectual. It may lie at the suit of one or more parties on either side to restrain the action of the court so far as it exceeds its jurisdiction and thereby affects the petitioner; but it is a discretionary writ and will not be granted unless it appears that the petitioner has vainly applied for relief to the court against which he wishes it to issue.'

"These cases have been constantly followed by later decisions of this court;" (citing cases).

State Bar of Michigan v. Ingham Circuit Judge (1943), 307 Mich. 393.[7] Writ granted to prohibit a chancery court from enjoining a state bar grievance committee (appointed by rule of court) from processing a disbarment complain. Said the court:

"In *Nichols v. Judge of Superior Court of Grand Rapids*, 130 Mich. 187, we said:

'The writ of prohibition is the appropriate remedy only where the court is acting entirely without jurisdiction or in clear excess of its jurisdiction. It is not applicable where the party has a complete and adequate remedy in some other and more ordinary form. * * * The principle is thus stated:

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[7] This is the case which gave rise to *Emmons v. Smith*, 149 F. 2d 869, quoted by appellees on their motion herein.

> 'The broad governing principle is that a prohibition lies where a subordinate tribunal has no jurisdiction at all to deal with the cause or matter before it, or where, in the progress of a cause within its jurisdiction, some point arises for decision which the inferior court is incompetent to determine. But a prohibition will not lie where the inferior court has jurisdiction to deal with the cause and with all matters necessarily arising therein, however erroneous its decision may be upon any point.'' *Heard, Shortt, Extraordinary Remedies*, p. 436.'
>
> ''The lack of jurisdiction in the chancery court clearly appeared from the bill of complaint."

In their responses appellants challenged the prohibition jurisdiction of the Supreme Court of Michigan which appellees' original petition therein invoked. It is important to consider just what the appellees alleged as the underlying basis of such jurisdiction. But one ground was alleged, the core of which is

> ''that the Circuit Court for the County of Wayne *is wholly without jurisdiction to consider and determine the litigation below for the reason that the plaintiffs are not proper parties*, having no litigable interest in the matter either as residents, taxpayers or so-called competitors'' and that *''such lack of any proper party plaintiff results in the lack of jurisdiction of said Circuit Court.''* (R. 11-13, italics added)

This allegation was implemented by statements as to why the exercise of prohibition jurisdiction was justified, i. e., avoidance of delay of usual procedure, need and public importance of the proposed city parking facilities and alleged nuisance character of the circuit court litigation, claimed to be evidenced by 40 critical newspaper clippings.

The petition for prohibition, on its face, disclosed no valid basis of original supreme court jurisdiction, and what appellees alleged as the sole reason for lack of circuit court jurisdiction presented no question of *jurisdiction* but only of *merits*, i. e., appellants' litigable status.

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General Investment Company v. New York Central R. Co., 271 US 228, 46 S Ct 496, 70 L ed 920, (italics added):

> "* * * By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon; and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought. There may be jurisdiction and yet an absence of merits * * * as where the plaintiff seeks preventive relief against a threatened violation of law of which he has no right to complain, *either because it will not injure him or because the right to invoke such relief is lodged exclusively in an agency charged with the duty of representing the public in the matter. Whether a plaintiff seeking such relief has the requisite standing is a question going to the merits, and its determination is an exercise of jurisdiction.* * * *If it be resolved against him, the appropriate decree is a dismissal for want of merits, not for want of jurisdiction.*"

See also *Angel v. Bullington*, page 7, ante.

The basic error made by appellees was that the petition for prohibition-mandamus did not present a case of attempted exercise of non-existent or excessive circuit court jurisdiction, but, on the contrary, patently attempted to arise a question of *merits of appellants' alleged cause of action*, i. e., appellants' interest in the matters complained of and the effect of such matters upon them and their properties and businesses; all of which was but *defensive* to the bill of complaint. In other words, a question of merits, not jurisdiction, was involved, and that question could not legally be presented to the Supreme Court of Michigan except through an appeal.

Appellants' litigable status could not, by any procedure, be determined adversely to them without deciding against the constitutional rights which they claimed.

Turning to appellees' explanation and argument of the second ground of their motion, they say that: (a) the court decided only a question of local law as to appellants' litigable status; (b) further consideration of the question was unnecessary because of prior decisions; (c) the Fourteenth Amendment gave appellants no right to a circuit court trial on the facts and, in any event, appellants had their day in court as fully as if the hearing in the Supreme Court was upon an appeal from a circuit court order granting appellees' motion to dismiss the bill of complaint for lack of subject matter and party jurisdiction, and (d), the provisions of the Michigan statute as to prohibition and mandamus apply equally to all litigants.

Item (a) has already been covered.

Item (b) is, indeed, a startling contention. In fine, appellees claim that the existence of prior supreme court decisions, among other parties and as to other ordinances, precluded circuit court jurisdiction concerning similar subject-matter and invested the Supreme Court of Michigan with prohibition power. Suffice to say that the interpretation and application of prior decisions is not a matter of jurisdiction. Far from being a bar to circuit court jurisdiction, the interpretation of prior decisions and their application to factual situations developed by evidence is the traditional, usual and recognized trial court function, to the discharge of which appellants were entitled under the equal protection and due process of laws provisions of the federal constitution. The Supreme Court of Michigan lacked jurisdiction to displace the circuit court.

Brief reference should be here made to the six prior decisions (R. 252-254) upon which the Supreme Court predicated its judgment of prohibition and upon which appellees rely.

Andrews v. City of South Haven (1915), 187 Mich. 294. Andrews sought to restrain the city from selling electrical fixtures, at approximately cost, in connection with the operations of the city light plant, in competition with Andrews' electrical fixture business. Demurrer to the injunction bill was sustained, not on the ground that he had no right to sue, but on the ground that

> "* * * It does not appear that the municipality in so doing is conducting the business by different methods or under other rules than those which are observed by and control private business corporations or private individuals in the operation of an electric plant. * * *
>
> "The bill does not show that complainant has sustained or will suffer any loss or damage as a taxpayer by reason of what is charged. * * * To entitle him to equitable relief as a taxpayer, present or prospective damages must be shown."

On appeal, the ruling was sustained.[8]

Two of the cases, *Menendez v. City of Detroit* (1953), 337 Mich. 476, and *Nichols v. State Administrative Board* (1954), 338 Mich. 617, merely determined that a general taxpayer, not affected by the proposed public activity or the revenue bond financing thereof, had no standing to enjoin same. The Supreme Court decision in the *Menendez case* was on appeal from a circuit court decree. The *Nichols case* was an original prohibition proceeding instituted in the Supreme Court against a public officer. No circuit court proceeding was involved.

Bowers v. City of Muskegon (1943), 305 Mich. 676 and *Cleveland v. City of Detroit* (1949), 324 Mich. 527, involved the use of public streets for parking purposes. In neither case was the right of the plaintiff to sue involved. Each

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[8]The Andrews decision did not bar another plaintiff, in a later case, from obtaining relief against a city which, without any necessity therefor, attempted to engage in a coal business in competition with plaintiff. *Toebe v. City of Munising*, 282 Mich. 1.

case was tried on the merits in the circuit court. Review in the Supreme Court was by appeal.

In denying that the exaction of meter fees was a tax rather than the exercise of valid police power, the court in the *Bowers case* said:

> "In the case at bar, there has been no satisfactory showing that the expense of enforcing police regulations, under the meter system, will be disproportionate to the cost of such regulations. Until such showing is made, we must conclude that the ordinance is one for the regulation of traffic and not to raise revenue."

The *Cleveland case* held that the city's use of the subsurface of a city street for the parking of motor vehicles was within the purpose for which the street had been dedicated. No question was involved as to the maintenance or continued maintenance of on-street parking meters nor as to the amounts that could be collected thereby, or for the undersurface parking.

The only case which involved municipal off-street automobile parking was *Wayne Village President v. Wayne Village Clerk* (1949), 323 Mich. 592, an original Supreme Court mandamus proceeding between city officials and to which no competitor or other person was a party. In appellants' responses to the petition of appellees for prohibition herein (R. 211), appellants denied that the ordinance in the *Wayne case* was practically identical with the Detroit ordinances and that the Wayne ordinance was upheld against the same attack as made by appellants herein. Appellants further alleged:

> "that the factual situation in the *Wayne case* differs materially from that involved in respondents' case, and the decision therein was expressly limited to the facts in and circumstances of that case"

including the facts that the action was a "friendly" one between the village officials; that the facts therein were admitted and did not involve the contentions made by [ap-

pellants] in their bill of complaint which seeks a determination of questions vitally affecting their businesses, property and individual rights. Further differences in the two cases were laid before the Supreme Court on oral argument, and, in the subsequent application for rehearing in the prohibition proceedings, i. e., the meter collections in the *Wayne case* were not unreasonable, only a single city parking lot adjacent to street meters was involved, and the revenue bond financing was "closed," not "open-end" (R. 268).

Even if the facts or issues in one or all of the six cases had been the same as those in appellants' circuit court suit, there was no basis for the application of the principle of res judicata or of collateral estoppel, for the reasons that appellants were not parties to any of the prior cases,[9] and no bar to the exercise of the power of the Supreme Court of the United States to review a state court judgment denying a federal right can be predicated upon a state court adjudication thereof.

This was definitely decided in United States v. Pink, 315 US 203, 62 S Ct 552, 86 L ed 796, *in which it was admitted not only that the same questions were involved in a prior case but also that the state court decision therein governed the subsequent case.*

The *Pink case* was on certiorari to review a state court summary judgment in favor of respondent Pink dismissing a complaint filed by the United States to recover surplus funds of a foreign insurance company in Pink's hands as state superintendent of insurance. He opposed certiorari reversal, on the ground that in *Moscow Fire Insurance Co. v. Bank of New York & Trust Co., et al,* NYS 2d 653, affirmed 284 NY 555, in which the United States had intervened,

[9] Res judicata and collateral estoppel are aplicable only against parties to an action. *Partmar Corporation v. Paramount Pictures Theatres Corporation,* — US —, 98 L ed (Advance p. 1). Neither principle applies to strangers to former litigation.

the New York Court of Appeals had determined that certain relevant Russian decrees had no extraterritorial effect.

> "Respondent insists that the complaint in this action was identical in substance and sought the same relief as the petition of the United States in the *Moscow F. Ins. Co. Case*, and that his answer set up the same defenses as were successfully sustained against the United States by the defendants in that case. He also maintains that both parties agreed on the motion for summary judgment that the decision in the *Moscow F. Ins. Co Case* governed this cause, leaving no issues to be tried."

a view with which the Supreme Court of the United States agreed as to questions of local law. Nevertheless, the Court reversed the judgment, saying:

> "But it does not follow, as respondent urges, that the writ should be dismissed as improvidently granted. The Moscow F. Ins. Co. Case is not res judicata since respondent was not a party to that suit.
>
> "* * * The claim of the United States based on the Litvinov Assignment raises a federal question. * * * This Court will review or independently determine all questions on which a federal right is necessarily dependent."

Young v. Ragen, 337 US 235, 69 S Ct 1073, 93 L ed 1333:

> "But it is not simply a question of state procedure when a state court of last resort closes the door to any consideration of a claim of denial of a federal right."

Broderick v. Rosner, 294 US 629, 55 S Ct 589, 79 L ed 1100:

> "The power of the state to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard therein is subject to the limitations imposed by the Federal Constitution."[11]

---

[10] Not only were appellants denied a trial of their circuit court case, but the Supreme Court of Michigan refused to decide the important question raised by appellants as to taxability of the city off-street parking garages.

Study of the six cases sustains the following conclusions:

The facts and issues therein involved differed materially from those in appellants' case, and the prior cases did not and could not determine the important questions raised by appellants and which were dependent upon or materially affected by the factual situations in which the instant statutes and ordinances operated or were intended to operate. None of the cases determined that there was a jurisdictional impediment to the exercise of circuit court jurisdiction nor a basis for investing the Supreme Court of Michigan with plenary prohibitory power. Not only do the prior cases establish no basis whatsoever for applying the bar of res judicata or of collateral estoppel, but no settled pattern of Michigan decisions as to the issues presented by appellants has emerged therefrom.

The differences in factual and legal situations between appellants' case and the prior cases pertain to the character of the litigants and their interest in and their relationship to the matters in controversy, the provisions of the challenged statutes and ordinances and the impact thereof upon the parties plaintiff, and the circumstances and conditions bearing upon the amount lawfully collectable by meters for on-street parking and upon the validity of a covenant to continue the same undiminished. In fact, no case in which a trial was had of the issues presented in appellants' bill of complaint has yet been before the Michigan Supreme Court or, for that matter, decided by a Michigan trial court, and in no other case has a litigant asserting like or similar rights or claims been denied the right to a trial thereof. There was no review of any of the six cases by the Supreme Court of the United States, nor have the important questions raised by appellants as to the

constitutionality of the statutes and ordinances here involved been decided by it.

Appellees misconceive the principle and the essence of equal protection and due process of law when they assert that appellants had the equivalent of a day in court because they would have had no greater hearing if the matter had been before the Supreme Court upon an appeal from a circuit court order sustaining a motion to dismiss the circuit court bill of complaint. In the first place, there is no reason to assume that the circuit court would not have denied the motion to dismiss the bill of complaint, heard the case and granted appellants the or some of the relief which they sought. Nor is the constitutional requirement of equal protection of the laws met by saying that appellants had as much of a hearing as anyone similarly barred from the circuit court would have had. The equal protection provision inhibits discriminatingly barring a litigant from access to the court. Appellees offer no gauge of standards to be applied in the prohibitory process, for which they contend, other than the unregulatable mental conclusion that a question of rights has been sufficiently litigated by others to justify a bar to further judicial consideration thereof. The untoward results of such a power are apparent. Fortunately, it has not been recognized as compatible with our system of administering justice.

Viewed from any angle, the judgment of the Supreme Court of Michigan upheld the statutes and ordinances in question against appellants' attack on the grounds of repugnancy to the Constitution of the United States, and did so by a procedure that denied appellants the equal protection and the due process of law guaranteed by that Constitution.

Appellants ask that the appellees' motion be denied.[11]

Respectfully submitted,

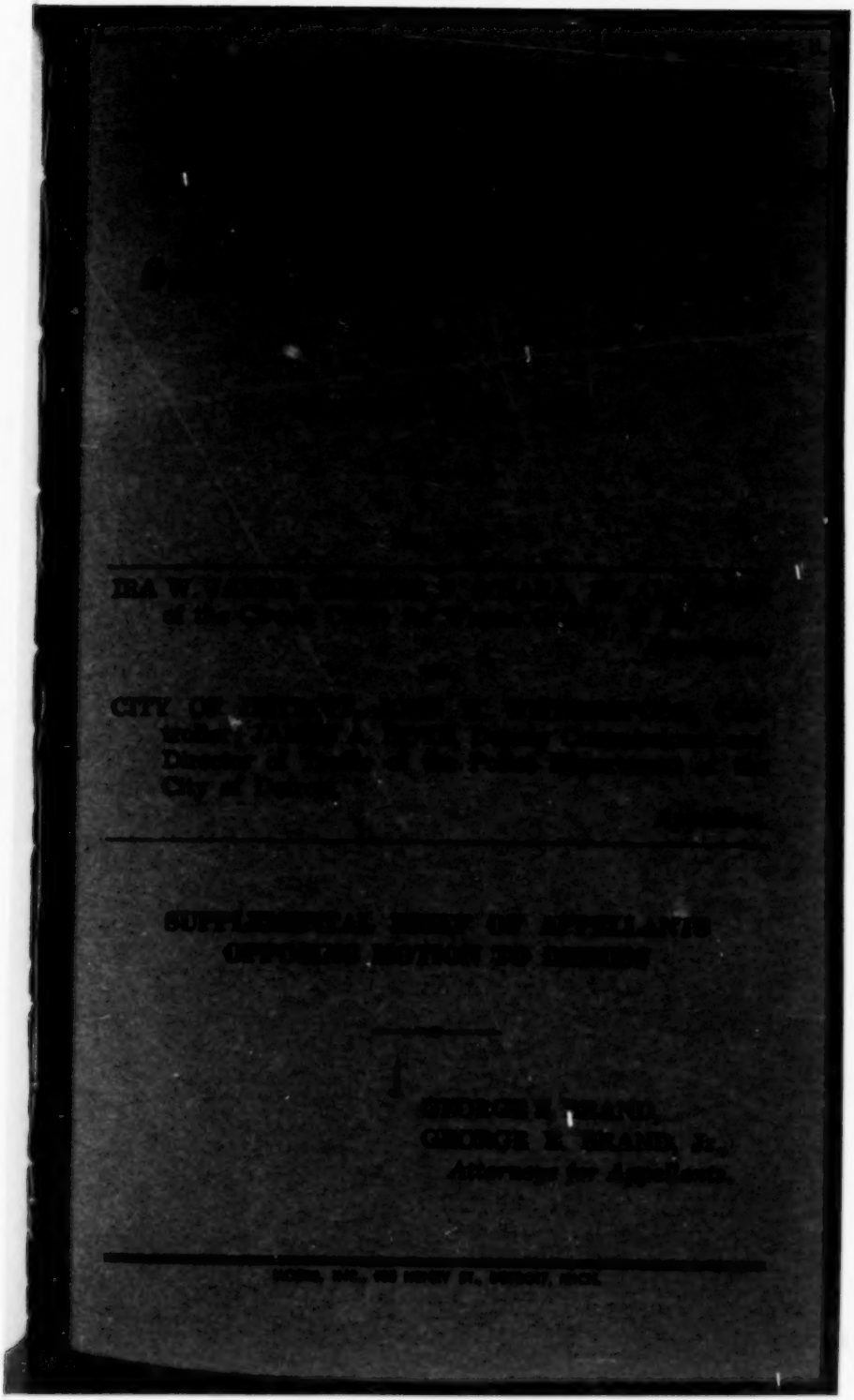
GEORGE E. BRAND,

GEORGE E. BRAND, Jr.,

Attorneys for Appellants.

Dated June 18, 1954.

[11] We fail to find that the "Rebuttal to Assignments of Errors" served by appellees is contemplated by any applicable rule.



In The

Supreme Court of the United States

OCTOBER TERM, 1954

No. 152

IRA W. JAYNE, CHESTER P. O'HARA, ET AL., Judges of the Circuit Court for Wayne County, et al.,

Appellants,

vs.

CITY OF DETROIT, JOHN H. WITHERSPOON, Controller; JAMES A. HOYE, Deputy Commissioner and Director of Traffic of the Police Department of the City of Detroit,

Appellees.

SUPPLEMENTAL BRIEF OF APPELLANTS OPPOSING MOTION TO DISMISS

We refer to the recent decision in *Sammons v. City of Beaufort*, Supreme Court of South Carolina, July 21, 1954, 83 S. E. 2d 153, in which that Court refers to *Gate City Garage, Inc. v. City of Jacksonville* (Fla.), 66 So. 2d 653, and *Wayne Village President v. Wayne Village Clerk*, 323 Mich. 592, cited by appellees.

The *Sammons case* involved the validity of a state statute and a city ordinance for revenue bond financing of a city owned and operated off-street parking *lot* by pledge of the income therefrom and from on-street parking meters under a covenant to maintain such meters and to charge fees for on-street parking sufficient to service the bonds. In deciding that such covenant was invalid, the court said:

> "It is a fundamental principle of constitutional law that no legislative body may part with its right to exercise the police power, nor may a municipality to which such power has been delegated divest itself of same by contract or otherwise. It is a continuing power which may be exercised as often as required in the public interest and must always remain fluid. * * *
>
> "We think that the covenant to maintain during the life of these bonds parking meters on the streets of Beaufort and to charge fees for the use of parking spaces thereon sufficient to service said bonds, constitutes an ineffective attempt to barter away the police power. * * * The governing body of the City of Beaufort must be left unrestricted in the future to adopt any parking regulations necessary for the public safety and welfare.
>
> "* * * It is true that the right is reserved to make appropriate changes in the location of parking meters where necessary in the regulation and control of traffic, but this is subject to the limitation that no such changes shall 'materially lessen the amount of revenues to be derived from its On-Street Parking Facilities.' It will thus be seen that the City covenants that the revenue derived from the on-street parking meters shall not be substantially reduced. As a result, future councils would be considerably restricted in making changes and certainly could not do away entirely with parking meters on the streets."

Referring to the Florida and Michigan cases, ante, the court added:

> "* * * Covenants to maintain on-street parking meters throughout the life of certain revenue bonds were upheld in these decisions. However, the question of whether a covenant of this nature constituted an attempt to barter away the police power was not discussed in the Michigan case, not referred to in the majority opinion in the Florida case, although lucidly discussed in the dissenting opinion. It must be conceded that the question of bartering away the police power was squarely met in the West Virginia and Illinois decisions, but we are not in accord with the views therein expressed on this question."

Thus the decisions of state Supreme Courts are in conflict as to a question of constitutionality of a covenant bartering away police-power—the final determination of which can only be made by the Supreme Court of the United States. The problem presented is a current one and is not confined to any particular area, but is widespread and of great moment.

Respectfully submitted,

GEORGE E. BRAND,
GEORGE E. BRAND, Jr.,
Attorneys for Appellants.

Dated September 22, 1954.

Office - Supreme Court, U. S.
JUN 21 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 152

IRA W. JAYNE, CHESTER P. O'HARA, ET AL., JUDGES OF THE CIRCUIT COURT OF WAYNE COUNTY, MICHIGAN, SERVICE PARKING GROUNDS, CIVIC CENTER GARAGE, INC., MADISON PARKING CO., ET AL.,

Appellants,

vs.

CITY OF DETROIT, JOHN H. WITHERSPOON, CONTROLLER, AND JAMES A. HOYE, DEPUTY COMMISSIONER AND DIRECTOR OF TRAFFIC OF THE POLICE DEPARTMENT, OF SAID CITY OF DETROIT

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

PAUL T. DWYER,
Corporation Counsel,
VANCE G. INGALLS,
HELEN W. MILLER,
JULIUS C. PLISKOW,
JAMES H. LEE,
Assistant Corporation Counsel,
301 City Hall,
Detroit, Michigan.

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SUPREME COURT OF MICHIGAN

No. 46,054

CITY OF DETROIT, JOHN H. WITHERSPOON, CONTROLLER, AND JAMES A. HOYE, DEPUTY COMMISSIONER AND DIRECTOR OF TRAFFIC OF THE POLICE DEPARTMENT, OF SAID CITY OF DETROIT, *Plaintiffs,*

vs.

IRA W. JAYNE, CHESTER P. O'HARA, ET AL., JUDGES OF THE CIRCUIT COURT FOR WAYNE COUNTY, MICHIGAN, SERVICE PARKING GROUNDS, CIVIC CENTER GARAGE, INC., MADISON PARKING CO., PARKING REALTY COMPANY, PARKING INVESTMENT CORPORATION, PARK PLACE CORPORATION, THEATRE PARKING, INC., UNION PARKING COMPANY, INCORPORATED, (ALL MICHIGAN CORPORATIONS), JOSEPH FEE AND BEULAH FEE, CO-PARTNERS AS WILLIS PARKING CO., JOSEPH M. JOSEPH, D/B/A ADAMS PARKING CO., HYMAN MILLER AND TILLIE MILLER, CO-PARTNERS AS JEFFERSON PARKING, SIDENY POZEN, D/B/A SIDMAR PARKING CO., GEORGE SALLOUM, D/B/A FOX PARKING CO., GEORGE RASHID, D/B/A BAGLEY PARKING CO., SAMUEL C. BINKOW, M. BERTHA BINKOW, JOSEPH KATCHKE AND IRMA J. KATCHKE, CO-PARTNERS AS BRIGGS PARKING, AND LOTTIE FELDMAN, *Defendants*

STATEMENT OF APPELLEES OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

Come now the appellees, City of Detroit, a municipal corporation, John H. Witherspoon, Controller of the City

of Detroit, and James A. Hoye, Deputy Commissioner and Director of Traffic of Detroit Police Department, and file their statement in opposition to jurisdiction, and hereby move the Court to dismiss the appeal or affirm the decision of the Supreme Court of Michigan from which decision and order granting writs of prohibition and mandamus said appeal is taken, or, if the appeal be treated as an application for certiorari, appellees move the Court to deny the application.

Nature of the Case

On December 15, 1953, appellants, owners and operators of off-street parking facilities in the City of Detroit, filed a bill of complaint in the Circuit Court for the County of Wayne, Michigan (a court of original jurisdiction), asking for an injunction restraining the City of Detroit from consummating its proposed revenue bond financing for municipal off-street parking facilities and from using money collected from street parking meters for municipal off-street parking facilities. Appellees also asked for a declaration of rights dealing with the aforesaid subjects and set forth the basis for their litigation, as follows:

> "29. The value of the properties used by plaintiffs in their business of operating and furnishing off-street automobile parking facilities, and also of said business, exceeds several millions of dollars, and to a great extent as to said properties, and to the entire extent as to said businesses, is dependent upon a reasonably profitable operation of said businesses of furnishing off-street automobile parking facilities. If said properties cannot profitably be used for such purposes, or if said businesses cannot be operated profitably, by reason of resort to improper or illegal means by the City of Detroit, or because of its improper or illegal regulation of the streets in said City or the wrongful exercise of the City's duties in respect of the use of said streets by the public, or because of the City's improper or illegal use of moneys collected for or because of on-street parking,

or by reason of the City improperly, illegally or unfairly competing with plaintiffs and others in the like business, great and irreparable loss and damage will result to plaintiffs and to each of them." (Being paragraph 29 of appellants' bill of complaint).

On December 30th, appellees filed a motion to dismiss said bill of complaint on the grounds that plaintiffs were not proper parties nor entitled to bring the action, that the bill of complaint did not state a cause of action or any grounds for equitable relief, and that the court lacked jurisdiction of both the plaintiffs and the subject matter. On the next day, December 31, appellees applied to the Supreme Court of Michigan for writs of prohibition and mandamus to stay further proceedings in the circuit court. Appellees alleged that plaintiffs were not proper parties, nor entitled to bring the action, that all the matters contained in the bill of complaint had theretofore been determined by the Supreme Court, and that the early disposition of the matter was imperative because of the great public importance to the City of Detroit, because of the great need for immediate provision for adequate off-street parking, and because the usual processes of preliminary hearings, trials and appeals through the lower courts would involve unavoidable delays and continue a long history of vexatious litigation designed solely for the purpose of preventing the issuance of bonds for the financing of these public projects. On January 4th, the Supreme Court of Michigan issued its order to show cause why the writs should not issue. Appellants filed their response, as did the judges of the lower court. Appellees filed answers to both, and briefs in support of the position of the parties were also filed. Briefs were also filed in support of the petition of the City of Detroit by amici curiae, namely, Downtown Property Association, Building Owners and Managers Association, Detroit Hotel Association, Traffic Safety Association of Detroit, Detroit Convention and

Tourist Bureau, Automobile Club of Michigan, City of Ann Arbor.

Hearing was had in the Supreme Court of Michigan on January 14th, at which hearings the parties were represented by counsel and arguments presented. Thereafter, further briefs were filed by the parties.

On February 18th, the Court rendered its decision, represented by a written opinion and an order directing the issuance of writs of prohibition and mandamus.

The opinion of the Court held that plaintiffs were not proper parties to institute such an action, did not have the required interest to justify the suit, held that appellees' allegations relative to the imperative need for an early disposition were fully justified, and concluded by passing on all of the questions asked by the appellants going to the merits of the case (except tax exemption question which the court held was premature) and as set forth in its application in the lower court for a declaration of rights. Appellants subsequently filed application for rehearing and brief in support thereof and reply and supplemental reply briefs. Rehearing was denied on April 6, 1954. Appellants now bring this appeal to the Supreme Court of the United States.

Issues

This appeal raises four issues, in none of which is there a substantial federal question such as would confer jurisdiction upon this Court.

The issues are:

(1) This is not a proper matter for appeal but should be considered as an application for certiorari.

(2) The order of the Supreme Court of Michigan, granting the writs of prohibition and mandamus did not deprive the appellants of federal constitutional rights of due process and equal protection.

(3) No decision of a federal question was involved, necessary or controlling in the determination of the cause by the Supreme Court of Michigan.

(4) The appellants were not deprived of due process or equal protection under the Federal Constitution by the ordinances or laws, the validity of which was challenged in the circuit court proceeding.

ARGUMENT

I

This Is Not a Proper Matter for Appeal but Should Be Considered as an Application for Certiorari

This Court has held that:

> "Certiorari, not writ of error (appeal) is the only mode of reviewing in the Federal Supreme Court the judgment of a state court granting a writ of prohibition over the objection that such prohibition would take property without the due process of law, contrary to the 14th amendment to the Federal Constitution."
>
> *Bullock* v. *Florida ex rel. Railroad Comm.*, 254 U. S. 513, 65 L. Ed. 380.

Appellees contend, therefore, that application for certiorari and not direct appeal is the only method of removal of this type of case from the Supreme Court of Michigan to the Supreme Court of the United States, and this appeal should, therefore, be considered as an application for certiorari.

In addition to the lack of a substantial federal question, as heretofore shown, there are no special and important reasons for granting certiorari as required by *U. S. Supreme Court Rule 38(5)*.

28 *U.S.C.A. 2103.*

II

The Order of the Supreme Court of Michigan, Granting the Writs of Prohibition and Mandamus, Did Not Deprive the Appellants of Federal Constitutional Rights of Due Process and Equal Protection

Appellants claim they had a right to trial in lower court of facts in issue under the 14th Amendment to the Federal Constitution. No such right is recognized by this Court. This Court has said:

> "The 14th amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided. This being the case, it is obviously not a right, privilege or immunity of a citizen of the United States to have a controversy in the state court prosecuted or determined by one form of action instead of by another. It is also equally evident, provided the form sanctioned by the state law gives notice and affords opportunity to be heard, that the mere question of whether it was a motion or ordinary action in no way rendered the proceeding not due process of law within the constitutional meaning of these words. Whether the court of last resort (of Michigan) properly construed its own Constitution and laws in determining that the summary process (prohibition and mandamus) under those laws was applicable to the matter which it adjudged, was purely the decision of a question of state law, binding upon this court. Mere irregularities in the procedure, if any, were matters solely for the consideration of the (Michigan Supreme) Court."
>
> *Iowa Central Ry. Co.* v. *State of Iowa*, 160 U. S. 389, 40 L. Ed. 467.

To the same effect:

> *Louisville & N. R. Co.* v. *Schmidt*, 177 U. S. 230, 44 L. Ed. 751;

Seattle R. & G. R. Co. v. *Washington ex rel. Linhoff*, 231 U. S. 568, 58 L. Ed. 372;

McDonald v. *Oregon R. & Nav. Co.*, 233 U. S. 665, 58 L. Ed. 1145;

Leeper v. *State of Texas*, 139 U. S. 462, 35 L. Ed. 225;

Ex Parte Wall, 107 U. S. 265, 27 L. Ed. 552;

Lambert v. *Central Bank of Oakland*, 85 Fed. (2d) 954;

St. Louis I. R. Co. v. *Taylor*, 210 U. S. 281, 52 L. Ed. 1061.

Appellants were accorded the same treatment, with notice and opportunity to be heard, as all other citizens are in accordance with the laws and decisions of the Supreme Court of Michigan, applicable to proceedings in that court for prohibition and mandamus. *Compiled Laws of Michigan, 1948*, Sec. 601.9 and 636.10 (M.S.A. 27.29 and 27.2237):

> 601.9 "The supreme court shall have a general superintending control over all inferior courts, to prevent and correct errors and abuses therein, where no other remedy is expressly provided by law, and shall have also jurisdiction of suits, actions and matters brought before it by writ of certiorari or writ of error, when the same shall be allowed by law to any inferior court, to magistrates and other officers, as well in cases of prosecution for any offense, misdemeanor or penalty, in the name of the people of this state, as in other cases, and by certificate of any circuit judge of any cause pending or tried before him, or by a case made and agreed upon by the parties or their attorneys, in any circuit court, and certified by the clerk of such circuit court, and shall have power to issue writs of error, certiorari, habeas corpus, mandamus, quo warranto, procedendo, prohibition, supersedeas, and all other original and remedial writs which may be necessary for the due execution of the law and the administration of justice, and the full and perfect exercise of its jurisdiction, and to hear and determine the same. In all other cases it shall have appellate jurisdiction only."

636.10 "Writs of prohibition shall be issued only out of the supreme court; and such writs shall be applied for upon affidavits, by petition, in the same manner as writs of mandamus; and if the cause shown shall appear to the court to be sufficient, a writ shall be thereupon issued, which shall command the court and the party to whom it shall be directed, to desist and refrain from any further proceedings in the suit or matter specified therein until the next term of the said supreme court, and the further order of such court thereon; and then to show cause why they should not be absolutely restrained from any further proceedings in such suit or matter."

Sections 636.11 through 636.15, Compiled Laws of 1948 (M.S.A. 27.2238-27.2242) as to procedure in prohibition were complied with.

Amberg v. *Welsh*, 325 Mich. 285, 38 N. W. (2d) 304;

State Bar of Michigan v. *Carr*, 307 Mich. 393, 12 N. W. (2d) 408;

McNally v. *Bd. of Canvassers*, 316 Mich. 551, 25 N. W. (2d) 613;

Scott v. *Chambers*, 62 Mich. 532, 29 N. W. 94.

The Supreme Court of Michigan, by its opinion and decision in this matter, determined, first, that the court had no jurisdiction of the parties, thereby deciding the case on a question of local law and procedure, and second, that on the merits of the case, the law as applied to the issue involved in the case gave the appellants (plaintiffs in circuit court) no cause of action. The decision of the Supreme Court, in effect said that the many cases on the subject previously decided by the Court on the same and similar issues, ordinances and laws, precluded further consideration of the subject matter. A trial of the issues of fact was therefore wholly unnecessary and would have accomplished no different result.

In addition, it should be noted that by this procedure, prohibition and mandamus, appellants were secured as comprehensive a hearing as they would have had, had the case been considered on a motion to dismiss for lack of jurisdiction of parties and subject matter and not stating a cause of action and appeal from a decision adverse to them thereon. The only thing they lost was delay.

Appellants had their day in court, and they, therefore, were not deprived of due process or equal protection under the *Constitution of the United States, Amen. 14.*

In a case similar to the one at bar, and in which the learned counsel for appellants in this case had sought and been granted a writ of prohibition and mandamus by the Supreme Court of Michigan for his client, the State Bar of Michigan, the Circuit Court of Appeals, 6th Circuit, said (as to the same contention made by appellant in that case as is here made by appellants in this case concerning denial of due process and equal protection):

In *Emmons* v. *Smith*, 149 Fed. (2d), p. 869, the Circuit Court of Appeals, 6th Circuit, said:

> "* * * That thereupon plaintiff filed a bill in the Circuit Court of Ingham County against the State Bar of Michigan for a judicial determination of his rights under the aforesaid decrees. The bill in the Ingham County Court sought injunctive relief against the State Bar of Michigan, the defendants therein, and an order issued against the State Bar to show cause why an injunction should not issue. The complaint avers that the Supreme Court of Michigan issued a writ of prohibition restraining the Judge of the Ingham County Circuit Court from taking jurisdiction of the bill of complaint filed therein. The present complaint does not so aver, but the truth, as it appears in the opinion of the Supreme Court, State Bar of Michigan v. Carr, 307 Mich. 393, 12 N. W. (2d) 408, is that the State Bar of Michigan was the petitioner for the writ of prohibition.

"* * * The theory of the bill is that the Supreme Court of Michigan was without constitutional authority to issue the writ of prohibition; that its action denied plaintiff due process of law and equal protection of the laws guaranteed by the Fifth and Fourteenth Amendments of the Federal Constitution; and that the 'Act to create the State Bar of Michigan' (Act 58 of the Public Acts of 1935) violates Art. XII, §§ 1 and 2 of the Michigan State Constitution, and that the Supreme Court of Michigan had deprived plaintiff of his constitutional rights to a hearing on the matters averred in the bill of complaint in the Ingham County Circuit Court.

"* * * Apropos of the charge that plaintiff was denied due process of law and equal protection of the laws, it is enough to say that Article VII, § 4 of the Constitution of the State of Michigan vests in the Supreme Court 'general superintending control over all inferior courts; and * * * power to issue * * * and other original and remedial writs, and to hear and determine the same,' and that under Sec. 27.29 of the Michigan Judicature Act, Mich. Stat. Ann. Vol. 20, p. 71, Comp. Laws 1929, § 13535, the Supreme Court is granted specific power to issue 'writs of * * * prohibition * * * and * * * other original and remedial writs which may be necessary for the due execution of the law and the administration of justice, and the full and perfect exercise of its jurisdiction, and to hear and determine the same.

"The complaint sets out that plaintiff was a party defendant to the petition for the writ of prohibition and appeared before the Supreme Court and made his defense thereto and that after the writ issued in conformity with the court's opinion, the plaintiff filed at least two petitions to rehear, in which he set up the same constitutional objections now advanced and that these petitions for rehearing and reconsideration were denied. In other words, the complaint fails to show that plaintiff was denied any reasonable opportunity to make his defense before the Supreme Court. The contention that he was denied the benefit of due process

therefore necessarily fails. State of Missouri ex rel. Hurwitz v. North, 271 U.S. 40, 42, 46 S. Ct. 384, 70 L. Ed. 818. The complaint that the issuance of the writ of prohibition was erroneous falls far short of a challenge that due process was lacking in the proceedings which led up to it. See American Ry. Express Co. v. Commonwealth of Kentucky, 273 U.S. 269, 47 S. Ct. 353, 71 L. Ed. 639; Arrowsmith v. Harmoning, 118 U.S. 194, 195, 6 S. Ct. 1023, 30 L. Ed. 243; Iowa Central Ry. Co. v. State of Iowa, 160 U.S. 389, 393, 16 S. Ct. 344, 40 L. Ed. 467; Tracy v. Ginzberg, 205 U.S. 170, 177, 27 S.Ct. 461, 51 L. Ed. 755; Bonner v. Gorman, 213 U.S. 86, 29 S. Ct. 483, 53 L. Ed. 709; Central Land Co. v. Laidley, 159 U.S. 112, 16 S. Ct. 80, 40 L. Ed. 91; McDonald v. Oregon R. & Nav. Co. 233 U.S. 665, 669, 34 S. Ct. 772, 58 L. Ed. 1145.

"The contention that plaintiff was denied equal protection of the laws as provided by the Fourteenth Amendment is unwarranted. There is nothing of substance in the complaint that the writ of prohibition was arbitrarily or capriciously issued or with any intention of affecting the rights of plaintiff as distinguished from those of any other citizen who had been or who might be found in the same class or confronted with the same circumstances. See Magoun v. Illinois Trust & Savings Bank, 170 U.S. 283, 290, 293, 18 S. Ct. 594, 42 L. Ed. 1037."

Certiorari was denied in this case by the U.S. Supreme Court, 326 U. S. 746. Same case in 13 A. L. R. 475—notes on Federal court's jurisdiction.

The reasoning of the above opinion and the U.S. Supreme Court decisions cited as authority, apply with equal force to the present case.

Under Michigan law the writ of prohibition is a discretionary writ which can only be issued by the State Supreme Court and the rules as to granting or denying it are the same as in mandamus cases.

Kloka v. *State Treasurer*, 318 Mich. 87, 27 N. W. (2d) 507;

Pt. Huron Savings Bank v. *St. Clair Circuit Judge*, 147 Mich. 551;

Constitution of Michigan, Art. VII, Sec. 4;

Compiled Laws of Michigan, 1948, secs. 601.9 and 636.10 (MSA 27.29 and 27.2237).

In the case of *Tawas & Bay Co. R.R. Co.* v. *Circuit Judge of Iosco Co.*, 44 Mich. 479, the Supreme Court of Michigan, as to the nature of, and authority of the Supreme Court to issue original writs, said:

> "The jurisdiction of this court in mandamus cases is not statutory, but plenary, and supervision is given over all inferior tribunals by the Constitution, Art. 6, sec. 3. Under the Constitution legal and equitable jurisdiction is united in the circuit courts, and it is enjoined that distinctions between the two jurisdictions shall be removed as far as possible. Sec. 5. In granting this remedy, courts are always disposed to confine it to cases where there is no other adequate specific remedy. But the existence of a remedy of another nature which is not adequate furnishes no reason for refusing it, if the necessity of justice requires it. We had occasion in LaGrange, relator v. State Treasurer 24 Mich. 468, to consider this jurisdiction quite fully and we think the views there expressed are in accordance with the soundest authority. Mandamus is a prerogative writ designed to afford a summary and specific remedy in those cases where without it the party will be subjected to serious injustice. As pointed out by the eminent authorities there cited, it is from its very nature a remedy that cannot be hampered by any narrow or technical bounds. The right coupled with the necessity of such a vindication of it supports the jurisdiction, and the court in using its discretion, while careful not to use this writ when it is not essential, will apply where it is.
>
> "As the English Chancery was not inferior to the King's Bench, that is reason enough why there are no

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precedents for the writ in chancery cases. But as explained in the cases just cited it is well settled that the existence of a specifiic remedy in equity does not oust the legal jurisdiction, but only appeals to the discretion of the common law court. Mr. Spence in his treatise on Equitable Jurisdiction refers to the jurisdiction in mandamus as one which if freely exercised might have rendered much of the interference of equity needless. 1 Spence Eq. Jur. 704. In a majority of cases the usual remedies are sufficient, and the necessary delays attending them are not so serious as to require any extraordinary remedy."

The Michigan Supreme Court (as well as other courts throughout the country) has long recognized that public interest and circumstances of urgency warrant the issuance of the writs of prohibition and mandamus to provide an adequate and speedy remedy where the delays attendant upon disposition of a case by a lower court and appeal would cause injustice or inconvenience and where the lower court lacks jurisdiction of the matter for any reason.

Amberg v. *Welsh*, 325 Mich. 285, 38 N. W. (2d) 304;
Loranger v. *Navarre*, 97 Mich. 615;
Evans v. *Superior Court*, 96 P. (2d) 107;
State Bar of Michigan v. *Carr*, 307 Mich. 393, 12 N. W. (2d) 408;
Scott v. *Chambers*, 62 Mich. 532; 29 N. W. 94;
Smith v. *State Board of Canvassers*, 220 Mich. 318;
McNally v. *Wayne Co. Canvassers*, 316 Mich. 551, 25 N. W. (2d) 613;
Baltimore Mail S.S. Co. v. *Fawcett*, 199 N. E. 628.

The petition for the writs filed in the Supreme Court of Michigan by appellee, City of Detroit, et al., shows the public interest and urgency of the matter and the delays already occasioned by repeated litigation in the providing of off-street parking in Detroit, as well as the lack of jurisdiction of the lower court.

It was upon this basis that the Supreme Court issued the writs in conformity with its previous decisions, and because the issues involved were previously adjudicated (except one which was was prematurely raised).

III

No Decision of a Federal Question Was Involved, Necessary, or Controlling in the Determination of the Cause by the Supreme Court of Michigan

The Supreme Court of Michigan, in its decision to issue writs of prohibition and mandamus did not decide any federal question, but even if it might be said that they did by inference, such decision was neither necessary nor controlling because of the fact that they decided that the lower court lacked jurisdiction of the case below for the reason that the plaintiffs had no standing in court to bring such an action.

This court has said:

> "We have often decided that it is not enough to give us jurisdiction over the judgments of the State courts for a record to show that a federal question was argued or presented to that court for decision. It must appear that its decision was necessary to the determination of the cause, and that it actually was decided, or that the judgment as rendered could not have been given without deciding it."
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> *Brown* v. *Atwell*, 92 U. S. 327; 23 L. Ed. 511;
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> *California Power Works* v. *Davis*, 151 U. S. 391; 38 L. Ed. 206;
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> *Bonner* v. *Gorman*, 213 U. S. 85; 53 L. Ed. 709;
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> *DeSaussure* v. *Gaillard*, 127 U. S. 216, 32 L. Ed. 125;
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> *Castillo* v. *McConnico*, 168 U. S. 674, 42 L. Ed. 662;
>
> *State ex rel. Citizens Bank of Louisiana* v. *Bd. of Liquidation*, 98 U. S. 140, 25 L. Ed. 114.

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In the *Castillo* case, above, this Court said:

> "Even though it be that a Federal controversy was decided, nevertheless, if the questions of a purely state character, upon which the Supreme Court of Louisiana passed, are completely adequate to sustain the decree by that court, rendered wholly independent of the Federal question, it will result that no Federal issue is presented for review. Egan v. Hart, 165 U.S. 188, 41 L. Ed. 680; Powell v. Brunswick County, 160 U.S. 441, 37 L. Ed. 1137, and authorities referred to in both the foregoing cases."

The jurisdictional question decided by the Michigan Supreme Court was "completely adequate to sustain the order by that court" and "was rendered wholly independent of a Federal question" and was a question of local law.

City and County of San Francisco v. *Itsell*, 133 U. S. 65, 33 L. Ed. 570;
Klinger v. *State of Missouri*, 80 U. S. 257, 20 L. Ed. 635.

The decision by the Michigan Supreme Court that the appellants had no standing in court was a decision under local law of a jurisdictional question, making its further decision on the merits unnecessary and not controlling.

IV

The Appellants Were Not Deprived of Due Process or Equal Protection Under the Federal Constitution by the Ordinances or Laws, the Validity of Which Was Challenged in the Circuit Court Proceeding

Not being proper parties plaintiff in the original proceeding, appellants could not challenge the validity of the ordinance or laws involved on any grounds.

Under the circumstances of this case (no taxes being involved and no increase in taxes being claimed– the ordi-

nances providing for financing of the city's off-street parking lots by revenues solely), the appellants had no standing to sue as taxpayers.

Menendez v. *City of Detroit*, 337 Mich. 476;

Nichols v. *State Administrative Board*, 338 Mich. 617.

As competitors of the City in the operation of off-street parking facilities, they had no standing to bring the action.

In *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, 82 L. Ed. 374, this Court said:

> "The claim that petitioner will be injured, perhaps ruined by the competition of the municipalities brought about by the use of the moneys, therefore, presents a clear case of damnum absque injuria. * * * State in other words, those municipalities have the right under state law to engage in the business in competition with petitioner, since it has been given no exclusive franchise. If its business be curtailed or destroyed by the operation of the municipalities, it will be by lawful competition from which no legal wrong results."
>
> "What petitioner anticipates, we emphasize is damage to something it does not possess—namely, a right to be immune from lawful municipal competition."

In *Puget Sound Power & Light Co.* v. *City of Seattle*, 291 U. S. 619, 78 L. Ed. 1025, this Court said:

> "The injury which appellant fears may result is the consequence of competition by the City and not necessarily of the imposition of the tax. Even without the tax the possibility of injury would remain, for the city is not bound to conduct the business at a profit. The argument that some way must be found to interpret the due process clause so as to preclude the damage of such an injury fails to point the way. Legislation may protect from the consequences of competition but the Constitution does not."

In *Andrews* v. *City of South Haven*, 187 Mich. 294, L. R. A. 1916A, the Supreme Court of Michigan said:

> "* * * the fact that a city engaging in a certain line of activity, commercial in its nature, competes with and thereby damages one of its inhabitants in his business, does not entitle him to relief, for the city owes him no immunity from competition."

In *Gate City Garage* v. *City of Jacksonville*, 66 S. (2d) 653, at p. 660, the Supreme Court of Florida had this to say on the same subject of competition by a city with private parking lot operators:

> "There may be public hospitals, waterworks, electric light plants, and other enterprises acquired and operated primarily for the benefit of the public and there may also be private hospitals, waterworks, and electric light plants acquired and operated primarily for private profit and private gain. When the Legislature specifically authorizes a particular undertaking, such as, the parking system involved in this case, and it is found and determined that such system primarily serves a public and municipal purpose, it is not a valid objection that the municipality will be engaged in competition with private business. This question has been definitely settled contrary to the contentions of the appellants in the cases of Hamler v. City of Jacksonville, 97 Fla. 807, 122 So. 220; State ex rel. Cummer v. Pace, 121 Fla. 871, 164 So. 723; State v. City of Tallahassee, 142 Fla. 476, 195 So. 402; Saunders v. City of Jacksonville, 157 Fla. 240, 25 So. 2d 648; State v. City of Jacksonville, Fla., 50 So. 2d 532.
>
> "We find no provision of the State or Federal Constitutions which prohibits a municipal corporation to acquire, own and operate a system such as that involved in this case because it may be in competition with private individuals, firms and corporations."

The injury which appellants here fear may result from the ordinances and laws involved is the consequence of lawful (note) competition by the City and not the method of financing by revenue from the system rather than taxation. As above stated by this Court, in the *Seattle* case, the appellants here must look to the legislature, not this court to prevent competition by the City of Detroit in the off-street parking business.

That the provision, operation and financing of parking facilities by municipalities, both off-street and on-street, is a lawful municipal concern, is no longer open to question in Michigan and elsewhere. (Note.)

(Note) In *Village of Wayne* v. *Clerk* (*Parr* v. *Ladd*), 323 Mich. 592, 36 N. W. (2d) 157, 8 A. L. R. (2d) 357, the Michigan Supreme Court said:

> "As to the objections to the legality of the ordinance here involved and here raised by the defendant, we conclude that a municipal parking system combining parking facilities both on public streets and on off-street property of a municipality, for which a charge for use is made, is a public use, and a public improvement within the meaning of the revenue bond act; that the acquisition and operation of such system by a municipality is not forbidden by the Michigan Constitution; that a municipality has the power to pledge the net revenues therefrom for the acquisition of off-street property and the operation and maintenance thereof as a part of such system; that the municipality has the power to issue revenue bonds payable solely out of the net revenues derived from the operation of such system, and to pledge such net revenues for payment of such bonds; and that the municipality has the power to pledge itself to acquire and maintain parking meters on such street and off-street property, and charge rates for the use of such facilities to provide for the payment of such bonds."

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To the same effect—

Cleveland v. *City of Detroit*, 324 Mich. 527, 37 N. W. (2d) 625, 11 A. L. R. (2d) 171;
Menendez v. *City of Detroit*, 337 Mich. 476, 60 N. W. (2d) 319;
Detroit v. *Wayne Circuit Judges*, 339 Mich. 62 (case below);
Stolorow v. *City of Pontiac*, 339 Mich. 199;
In re Widening of Fulton Street, 248 Mich. 13, 64 A. L. R. 1507;
Bowers v. *City of Muskegon*, 305 Mich. 676, 9 N. W. (2d) 889.

In accord with Michigan:

Poole v. *Kankakee*, 94 N. E. (2d) 416;
Miller v. *City of Georgetown*, 191 S. W. (2d) 403;
McGorley v. *Fitzgerald*, 59 Atl. 142;
Gate City Garage v. *Jacksonville*, 66 So. (2d) 653;
State v. *Chambers*, 77 S. E. (2d) 297;
Denihan Enterprises v. *O'Dwyer*, 99 N. E. (2d) 235;
Whittier v. *Dixon*, 151 P. (2d) 5, 153 A. L. R. 956;
Bowman v. *Kansas City*, 233 S. E. (2d) 26;
San Francisco v. *Lenares*, 106 P. (2d) 369;
Richmond v. *Dervishian*, 57 S. E. (2d) 120;
Mich. Blvd. Bldg. v. *Chicago Park Dist.*, 106 N. E. (2d) 359;
Florida v. *City of Miami Beach*, 47 So. (2d) 865;
Brodhead v. *City of Denver*, 247 P. (2d) 140;
Barnes v. *City of New Haven*, 98 A. 2d 523;
State v. *Rhodes*, 100 N. E. (2d) 225;
State v. *City of Miami Beach*, 47 So. (2d) 865;
Chase v. *City of Sanford*, 66 So. (2d) 653.

"One of the elementary doctrines of constitutional law firmly established by authorities, is that the consti-

> tutionality of a legislative act is open to attack only by a person whose rights are affected thereby. Before a law can be assailed by any person on the ground that it is unconstitutional, he must show that he has an interest in the question in that the enforcement of the law would be an infringement of his rights."
>
> *11 Am. Jur.* 748.

To the same effect:

16 C. J. S. 157

and numerous citations in notes.

In accordance with the law as laid down by this Court and other authorities above, appellants have no legal rights or interest in the ordinances or laws involved which would permit them to attack them on constitutional grounds or otherwise and therefore could not be deprived of due process or equal protection under the 14th Amendment of the Federal Constitution.

Relief

In the first section of the Argument, appellees have submitted that this appeal should, under the rules of this Court, be considered as an application for certiorari. In lieu of such a ruling by the court, appellees are requesting the Court to affirm the decision of the Supreme Court of Michigan, as an alternative to granting a motion to dismiss the appeal, on the ground that it is manifest that this appeal, as well as all of the preceding litigation, is taken for the purpose of delay only, and that the questions raised by the appellants are so unsubstantial as not to need further argument. We support these statements by a description of the litigation hereinbefore set forth, the decision of the Supreme Court of Michigan, the record, and our argument herein.

(*U. S. Supreme Court Rule 7*, Sub. 4)

Conclusion

Appellees respectfully submit that the appellants have failed to raise a substantial federal question or to show any deprivation of rights to due process or equal protection under the 14th Amendment of the Federal Constitution, and therefore, appellees' motion to dismiss or affirm should be granted or, if the appeal is to be considered as an application for certiorari, the application should be denied.

For the same reasons urged by appellees in their Petition for Prohibition—Mandamus filed in the Supreme Court of Michigan, as to the urgency and importance of an early determination and conclusion of the Circuit Court cause, appellees now respectfully urge an early determination of this appeal on their motion to dismiss.

PAUL T. DWYER,
Corporation Counsel,
VANCE G. INGALLS,
HELEN W. MILLER,
JULIUS C. PLISKOW,
JAMES H. LEE,
Assistants Corporation Counsel,
Attorneys for Appellees,
301 City Hall, Detroit 26, Michigan.

JUNE 2, 1954.

In The

Supreme Court of the United States

OCTOBER TERM, 1954

No. 152

IRA W. JAYNE, CHESTER P. O'HARA, ET AL., Judges of the Circuit Court for Wayne County, Michigan, SERVICE PARKING GROUNDS, CIVIC CENTER GARAGE, INC., MADISON PARKING CO., ET AL.,
Appellants,

vs.

CITY OF DETROIT, JOHN H. WITHERSPOON, Controller; JAMES A. HOYE, Deputy Commissioner and Director of Traffic of the Police Department of the City of Detroit,
Appellees.

Appeal from the Supreme Court of the State of Michigan

PETITION FOR REHEARING

TO THE SUPREME COURT OF THE UNITED STATES AND THE JUSTICES THEREOF:

Appellants, Service Parking Grounds, Civic Center Garage, Inc., Madison Parking Co., Parking Realty Company, Parking Investment Corporation, Park Place Corporation, Theatre Parking, Inc., Union Parking Company, Incorporated, Willis Parking Co., Jefferson Parking, Briggs Parking, and Lottie Feldman present this, their petition for a rehearing of the above entitled cause, and, in support thereof, respectfully show:

1. On October 14, 1954 an order was entered in the above cause granting appellees' motion to dismiss appellants' appeal, and dismissing said appeal "for want of a substantial federal question."

2. By their appeal appellants sought to review a final judgment of the Supreme Court of Michigan entered in an *original* proceeding therein, prohibiting appellants from maintaining their suit in the Circuit Court for Wayne County, Michigan, in Chancery, in which they challenged the validity of certain city ordinances for revenue bond financing of a number of proposed city-owned and operated off-street automobile parking garages and lots, financed by pledging the profits derived by the city from its on-street parking meters, under the ordinances which bound the city not substantially to diminish the number of existing or future on-street parking meters nor the amount of the revenue derived therefrom, while the bonds remain unpaid and to exact parking meter collections sufficient to repay the bonds.

3. In the prohibition proceedings appellants contended that the Supreme Court of Michigan had no original jurisdiction in the matter, but if it did appellants were entitled to a trial in that court of the issues of fact involved in their claims that the ordinances were unconstitutional for the reason, among others, that the city had only police-power rights in the city streets and could neither use the streets for profit purposes nor bind itself for periods exceeding 30 years, to continue such profit-making use of the streets and to maintain on-street parking meters—all for the purpose of financing off-street parking facilities in ruinous competition with appellants' off-street parking facilities.

4. In their circuit court bill of complaint, in their responses in the Supreme Court prohibition proceedings and in their petition for rehearing therein, and in their appeal to this Court, appellants contended that, contrary to the federal constitution, they were denied the due process of law and the equal protection of the laws by the prohibition

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proceeding and judgment and also by the ordinance provisions binding the city to continue on-street parking meters and fixing the amount of profit to be derived thereby.

5. The grounds upon which this petition for rehearing is based are:

(1) One basis of the prohibition judgment necessarily was that the appellants were precluded from having a judicial determination of the federal questions which they raised, on the theory that they had no sufficient interest therein and in prior litigation between other parties and under other circumstances and conditions, the federal questions had been sufficiently litigated. This presents an important and substantial question and not merely a question of state law.

(2) Regardless of ground (1), the effect of the prohibition judgment was to uphold, and to declare constitutional and effective, under the federal constitution, a bartering away of the city's police power as to the control of the city streets perforce the ordinance provisions requiring the city to continue its present and future on-street parking meters and not materially dimminish the amount of profit derived therefrom—regardless of future conditions and circumstances. Being peculiarly and vitally affected by the results, appellants contend that an important and substantial federal question was presented by their appeal.

(3) The combination of grounds (1) and (2) resulted in the denial of due process of law and equal protection of the laws contrary to the federal constitution—and this presents a very important and substantial federal question.

(4) Appellants have not been accorded the benefit of oral argument nor of an opinion by the Justices of this Court either as to the question of substantiality of the federal constitutional questions which their appeal presented, or on the merits, even though, as shown in appellants' supplemental brief dated September 22, 1954, an increasing conflict in decisions of state supreme courts exists as to the constitutionality of the ordinance provisions of the kind here involved.

WHEREFORE, it is respectfully and sincerely urged that this petition for rehearing be granted, even if rehearing be limited to the question of the validity of the ordinance provision requiring the city to continue present and future on-street parking meters and to derive therefrom an amount of revenue sufficient to finance city owned and operated off-street parking facilities competitive with those of appellants, and that the order dismissing the appeal be reversed and the motion to dismiss be denied.

Respectfully submitted,

GEORGE E. BRAND,

GEORGE E. BRAND, Jr.,
Attorneys for Appellants.

November 3, 1954.

CERTIFICATE OF COUNSEL

I, George E. Brand, one of the counsel for the above named appellants, do hereby certify that the foregoing petition for a rehearing is presented in good faith and not for delay.

GEORGE E. BRAND,
Counsel for Appellants.

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In The

Supreme Court of the United States

OCTOBER TERM, 1954

No. 152

IRA W. JAYNE, CHESTER P. O'HARA, ET AL., Judges of the Circuit Court for Wayne County, Michigan, SERVICE PARKING GROUNDS, CIVIC CENTER GARAGE, INC., MADISON PARKING CO., ET AL.,
Appellants,

vs.

CITY OF DETROIT, JOHN H. WITHERSPOON, Controller; JAMES A. HOYE, Deputy Commissioner and Director of Traffic of the Police Department of the City of Detroit,
Appellees.

Appeal from the Supreme Court of the State of Michigan

APPELLANTS' BRIEF ON PETITION FOR REHEARING

Unguided by any opinion, the hazards of erroneous assumptions are inescapable.

Although appellants claimed that the denial of a trial, in some court, of the issues of fact presented in their chancery action denied them equal protection and due process of law, we assume that this Court viewed that question as involving only a settled question of state law.

We also assume that the questions whether off-street parking facilities bore a sufficient relationship to regulation of on-street parking to justify the use of street parking meter collections for the city's acquisition and operation of off-street parking garages and lots, and whether the street parking fee rate was proper, were likewise considered as involving nothing more than non-reviewable questions of state law.

To treat appellants' appeal as involving only such limited questions is to over-simplify, because even if it be conclusively settled that the relationship referred to did exist and the fixing of a meter rate is a legislative function, *there is still presented the important question as to the right of the city, by attempted exercise of police power, to bind itself to continue to maintain all present and all future on-street parking meters without material diminution in the number thereof or of the amount of money* thereby collected, for the purposes of financing the city's off-street facilities in ruinous competition with appellants, or for any other purpose.

There can be no doubt that the ordinances herein do deprive the city of the right, from time to time and as varying conditions may require, to exercise its police power over the use of the city streets. The ordinances recite that they are pursuant to the Michigan Revenue Bond Act of 1933 as amended (R. 90-93).[1] However, no provision of that Act or of the Michigan Constitution even purports to authorize the city to bind itself for long periods of years to maintain present and future parking meters and thereby to collect any specified amounts for the purpose of revenue bond financing of parking facilities or for any other purposes. The inclusion of such provisions in the ordinances in question was solely by city legislation. However, consti-

[1] Act No. 94, P.A. Mich. 1933, §§ 141.101-141.138, C.L. '48.

tutionality of these extra provisions does not and cannot turn upon any question of state law because the limitations imposed by the federal constitution on the exercise of police power are applicable not only to the city but to the state itself. Neither can barter away its police power.

Chicago & Alton Railroad Company v. Tranbarger, 238 US 67, 59 L ed 1204. In referring to police power of the state, this Court said:

> "It is established by repeated decisions of this court that neither of these provisions of the Federal Constitution has the effect of overriding the power of the state to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."

The Boston Beer Company v. Commonwealth of Massachusetts, 97 US 25, 24 L ed 989. In referring to the exercise of police power, for health, etc., this Court said:

> "The Legislature cannot, by any contract, devest itself of the power to provide for these objects."

Accord:

Missouri, Kansas, & Texas Railway Company v. Oklahoma, 271 US 303, 70 L ed 957.

Texas & New Orleans Railroad Company v. Miller, 221 US 408, 55 L ed 789.

E. C. Warner Co. v. W. B. Foshay Co. (CCA 8), 57 F 2d 656.

Village of Grosse Pointe Shores v. Ayres, 254 Mich. 58.

(Of course the Michigan Supreme Court could not confer upon the city any power to contract away its police power over the city streets.)

The foregoing principles have been applied to a revenue bond ordinance of the same type as is involved in the instant appeal.

Britt v. City of Wilmington (Supreme Court, North Carolina, 1952), 72 S.E. (2d) 289. Action to restrain the issuance of off-street parking facility revenue bonds and the pledging of revenues from on-street parking meters for the payment thereof. In reversing the lower court which had refused to grant the injunction, the Supreme Court said:

> "It follows that the mere fact the off-street parking facilities defendant proposes to install tend to promote the safety, convenience, or general welfare of its citizens is not determinative. * * *"
>
> "* * * Furthermore, the governing board of a municipality may not bind itself to enact, and the municipality to maintain for tweny-five years, a regulatory ordinance pertaining to the governmental functions of the city. *It cannot thus farm out is legislative functions or delegate to private individuals the right to determine whether and to what extent one of its police regulations may be amended.*" (Italics added)

To the same effect is the holding in the very recent case of *Sammons v. City of Beaufort* (Supreme Court of South Carolina, July 21, 1954), 83 S.E. 2d 153, wherein the court said:

> "We think that the covenant to maintain during the life of these bonds parking meters on the streets of Beaufort and to charge fees for the use of parking spaces thereon sufficient to service said bonds, constitutes an ineffective attempt to barter away the police power. * * * The governing body of the City of Beaufort must be left unrestricted in the future to adopt any parking regulations necessary for the public safety and welfare."

In their circuit court bill of complaint and in their defense in the prohibition proceedings and their application for rehearing therein, appellants claimed that the provisions of the ordinances binding the city to maintain

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parking meters and thereby to collect funds sufficient to pay for the off-street parking facilities was contrary to the Fourteenth Amendment (R. 127, 130-132, 219, 263-264).

As appellants alleged in their bill of complaint* (R. 206), the ordinance provisions binding the city to continue the parking meter collections for the purpose of supplying off-street parking facilities below cost would result in wrongful and unfair competition with appellants and destroy or greatly depreciate their parking business and properties. The right of appellants to challenge this committment of the city is surely substantial and redress is available only through litigation instituted and prosecuted by them.

On page 3 of appellants' original brief herein decisions of this court are cited holding that a state court judgment sustaining the validity of a state statute as a valid exercise of police power, against a claim of repugnancy to the Fourteenth Amendment, is reviewable on appeal.

Ultimate protection against excessive exercise of police power must be found in the court. The right to make the challenge and to have a judicial determination of the validity of the challenged act is a substantial one and when, as in this case, the challenge is based on repugnancy of the challenged act of the Fourteenth Amendment and the challenger is denied the right to litigate the question, a substantial federal question arises.

Even if the decision of the Michigan Supreme Court as to the validity of the ordinances under the Michigan Constitution and statutes was not reviewable, the decision of that court, which either denied appellants the right to litigate the alleged repugnancy of the ordinances to the Fourteenth Amendment or upheld constitutionality against such attack, presented a substantial federal question, determination of which is only attainable in this Court.

*, supra, and in their response in the prohibition proceedings

Substantiality of the question as to the constitutionality of the type of ordinance provisions here involved is attested by the state supreme court decisions to which we have referred. Those referred to in appellees' original brief did not regard the question as frivolous or unimportant.

Respectfully submitted,

GEORGE E. BRAND,

GEORGE E. BRAND, Jr.,
Attorneys for Appellants.

Dated November 6, 1954.

No. 152. JAYNE ET AL., JUDGES OF THE CIRCUIT COURT OF WAYNE COUNTY, ET AL. *v.* CITY OF DETROIT ET AL. Appeal from the Supreme Court of Michigan. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *George E. Brand* for appellants. *James H. Lee* for appellees. Reported below: 339 Mich. 62, 62 N. W. 2d 626.

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